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No. 11347

United States

Circuit Court of Appeals

For the Ninth Circuit.

LERNER STORES CORPORATION,
a Corporation,

Appellant,

vs.

WILFRED A. LERNER,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

AUG 8 - 1946

PAUL P. O'BRIEN, /

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Northern District of California, Southern Division.

No. 23662-G

LERNER STORES CORPORATION, a corporation,

Plaintiff,

vs.

WILFRED A. LERNER,

Defendant.

COMPLAINT

1. Plaintiff, Lerner Stores Corporation, is a corporation incorporated under the laws of the State of Maryland. Defendant, Wilfred A. Lerner, is a citizen of the state of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. Plaintiff and predecessor concerns whose assets and goodwill plaintiff has acquired, have for over 28 years last past been continuously engaged in the sale at retail of low-priced women's wearing apparel through a group of stores located in [1*] the populous cities throughout the United States. Plaintiff has specialized in supplying the needs of these members of the purchasing public who desire low-priced women's dresses, slacks, skirts, waists, blouses, hosiery, and other accessories of women's wearing apparel. As of January 31, 1944,

* Page numbering appearing at foot of page of original certified Transcript of Record.

plaintiff conducted 180 retail stores in 42 states, including stores located in the States of California, Oregon, Washington, Nevada and Arizona. Plaintiff's business and all of its stores are known, designated and referred to by the purchasing public as "Lerner's" and "Lerner Shops," and are associated in the minds of the purchasing public with wearing apparel of the very latest styles and good fashion, at very reasonable prices.

3. Plaintiff first began business in the State of California in 1930, and as of January 31, 1944, plaintiff conducted and now conducts 13 stores in the State of California. Two of plaintiff's stores in California are located in San Francisco, one in Oakland, and plaintiff's other stores in California are located in Stockton, Santa Barbara, Pasadena, Bakersfield, San Diego, San Bernardino, Huntington Park, Inglewood and Long Beach. Plaintiff's stores in San Francisco and Oakland include among their customers residents of the City of San Jose and other Santa Clara and San Mateo County communities. Furthermore, on January 31, 1941, plaintiff leased certain premises in San Jose, California, designated as 152 South First Street, for the purpose of conducting therein one of plaintiff's retail stores. On the date of said lease said premises were occupied by other persons under leases which were to expire by July 1, 1942. Plaintiff planned that upon the expiration of such tenancies on July 1, 1942, plaintiff would occupy and conduct one of its retail stores in said premises. In and by said lease of January 31, 1941, plaintiff obligated

itself to rent said premises for the term commencing July 1, 1942, and ending [2] May 31, 1963, and to pay as rental the sum of \$900.00 per month from July 1, 1942, to May 31, 1943, and the sum of \$1,000.00 per month commencing June 1, 1943, and for the remainder of the term of said lease. Prior to July 1, 1942, however, war intervened, and war-time governmental restrictions upon construction work were enacted, and due to such governmental restrictions during the war emergency period, plaintiff's plans for improvement and occupancy by plaintiff of said San Jose premises are being held in abeyance pending the lifting of said restrictions. Plaintiff's lease upon said San Jose premises has continued and is in full force and effect. Plaintiff has temporarily sub-leased said premises at the rental of \$800.00 per month until said construction restrictions are lifted, and plaintiff continues to pay to its lessor said rental of \$1,000.00 per month as required of plaintiff under its lease of January 31, 1941.

4. Plaintiff's business has been increased and developed by means of the expenditure of great effort, sound business policy, and the investment by plaintiff's stockholders of their funds, together with the continuous presentation to the purchasing public of the names "Lerner" and "Lerner Shops." By means of such expenditures, investments and presentation of said names, plaintiff has established a large, continuous and profitable volume of sales through the medium of its retail stores associated in the minds of the purchasing public with the names

“Lerner” and “Lerner Shops.” Such sales for the fiscal year ended January 31, 1944, were in excess of \$75,000,000.00, and plaintiff’s net profits from such sales were in excess of \$2,000,000.00. Such sales for the year ended January 31, 1943, were approximately \$65,000,000.00, and plaintiff derived a profit in excess of \$1,500,000.00 therefrom.

5. In May, 1944, and for a long time prior thereto, the names “Lerner” and “Lerner Shops” identified in the minds [3] of the purchasing public low-priced women’s wearing apparel of the very latest styles and good fashion emanating from Lerner Stores Corporation; the names “Lerner” and “Lerner Shops” have been acknowledged and accepted by the purchasing public throughout the United States and throughout the State of California as identifying the retail stores and merchandise of plaintiff, and such names have come to have a value far in excess of \$3,000.00 in connection with the sale, distribution and merchandising of women’s wearing apparel because associated in the minds of the purchasing public with plaintiff’s wearing apparel as above described.

6. Prior to May, 1944, defendant, Wilfred A. Lerner, was engaged at San Francisco, California, in association with his father, L. G. Lerner, in the manufacture and sale at wholesale of women’s coats and suits under the business name of “L. G. Lerner.” As a result of the conduct of such manufacturing and wholesale business defendant well knew of plaintiff’s existence and well-established business and good reputation.

7. On or about June 1, 1944, defendant conceived the idea of defrauding and damaging plaintiff and appropriating a part of plaintiff's goodwill by engaging, in San Jose, under the name of Lerner's, in the same business as plaintiff's well-known and long-established business, and thereby causing defendant's business to be thought of by the public as belonging to plaintiff's long-established and well-known group of stores. In furtherance of his said idea, defendant inserted a series of advertisements in the newspapers published and circulated in San Jose and the surrounding communities which were calculated to convey to the public the idea that one of plaintiff's well-known retail stores was commencing business in San Jose. Beginning on May 28, 1944, and continuing each day thereafter until the opening of defendant's store on June 1, 1944, [4] defendant's advertisements in said newspapers read as shown on the copy of such advertisements which is attached hereto as Exhibit "A", and hereby made a part hereof. In said advertisements the name "Lerner" was printed as the outstanding part, and was written in script letters similar to the lettering often used by plaintiff to identify plaintiff's business.

On May 31, 1944, defendant's advertisement in said San Jose newspapers stated as is shown on the copy of such advertisements which is attached hereto as Exhibit "B," and hereby made a part hereof.

On June 2, 1944, defendant's advertisement in

said San Jose newspapers stated as is shown on the copy of such advertisements which is attached hereto as Exhibit "C," and hereby made a part hereof.

On June 9, 1944, which was the beginning of the second week of the operation of defendant's new business, defendant's advertisement in said San Jose newspapers stated as is shown on the copy of such advertisements which is attached hereto as Exhibit "D," and hereby made a part hereof.

8. Since June 1, 1944, defendant has engaged at San Jose in the conduct of said retail store for the sale of women's apparel at low prices under the name of "Lerner's" and "Lerner Apparel," and defendant has continuously and prominently advertised and represented his business as Lerner's, San Jose, and has displayed and emphasized the name Lerner's, as hereinabove described, upon his place of business and in his advertising. Defendant has failed to disclose or indicate any part of his name other than said surname of Lerner.

9. The use by defendant of the name "Lerner" without any distinguishing feature which would differentiate it from plaintiff's business, the use of the name "Lerner" in the possessive form "Lerner's" followed by the reference to an address [5] in San Jose, the writing of said name in script letters as above described, and the advertisements published by defendant in connection with the opening of his new business were deliberately and wilfully done by defendant for the purpose of defrauding and damaging plaintiff and appropriating a part of

plaintiff's goodwill. Such use of the name "Lerner" and such advertising were calculated to, and did deceive members of the public, by causing them to believe that plaintiff was opening one of its chain of retail stores in San Jose, and thereby defendant was enabled to attract members of the public who had been accustomed to patronize plaintiff's stores.

10. Said acts of defendant have caused patrons who would otherwise patronize plaintiff to patronize defendant, and have diminished the value of plaintiff's goodwill by depriving plaintiff of the exclusive use in its business of the name "Lerner" for the purpose of identifying said business, and by causing members of the public to associate said name with a retail store engaged in the same kind of business but which is not a part of or connected with plaintiff's business, and to cause said name "Lerner" to lose in the minds of the public its distinctive association with retail stores operated by and merchandise emanating from plaintiff. Plaintiff has been damaged by the acts of defendant to the date of this complaint in the sum of \$50,000.00; said acts of defendant will result in further pecuniary damage and injury to plaintiff, the amount of which cannot yet be ascertained. Plaintiff prays leave to amend its complaint so as to insert the amount of such additional damage when it shall have been ascertained.

11. The effect of defendant's advertising and conduct is to convey a misrepresentation to, and to confuse the purchasing public in that the ordi-

nary purchaser is led thereby to believe that the defendant's store is one of plaintiff's [6] stores and is selling plaintiff's merchandise, when in truth and in fact defendant does not sell plaintiff's merchandise and is not connected with plaintiff.

12. The effect of defendant's advertising and conduct is such that it will cause confusion in the public mind and damage to plaintiff if the name "Lerner's" or "Lerner" is used by defendant in his store, in his advertising, in his dealings with his customers or in any other manner in the conduct of a business similar to the business carried on by plaintiff. The experience and contacts of defendant prior to opening his retail store in San Jose were never such as to invest his name with value as a proper means of identification of retail stores or of merchandise with the distribution of which he was in any way connected. The only commercial value of defendant's name when he opened said store lay in the likelihood that it would lead the purchasing public and others to mistake the store and merchandise which it ostensibly identified for plaintiff's stores and merchandise known as "Lerner's" and "Lerner Shops."

13. The defendant's conduct as above set forth is a fraud upon the public and a source of damage to plaintiff and constitutes unfair competition with plaintiff in that it operates and will continue to operate to deprive plaintiff of sales, and to diminish and dilute the value of plaintiff's goodwill, which

has been built up and depends upon the use of the name "Lerner" and "Lerner Shops."

14. Plaintiff first learned of defendant's conduct and actions on or about June 30, 1944. Plaintiff requested of defendant in writing that he change the name under which his store is operating and advertised so that there would not be any confusion or unfair competition between defendant's new business and plaintiff's long-established and well-known business. Defendant has persisted in his actions and conduct as [7] above alleged and has refused to make any change therein whatsoever.

15. Defendant intends and threatens to continue to make use of the name "Lerner" without the permission or authority of plaintiff and in the foregoing deceptive and injurious manner. Such threatened acts of defendant will, if permitted to take place, cause the present and prospective customers of plaintiff and other members of the public to be deceived and misled and will cause further and repeated injuries to the plaintiff. Such acts would, if permitted, further impair the plaintiff's rights in the exclusive use in the type of business conducted by plaintiff of the name "Lerner" and would further impair the value of plaintiff's right, which value the plaintiff has obtained through the association, exclusively, of said name in the minds of the public with merchandise emanating from the plaintiff and with the retail stores conducted by plaintiff. It would be extremely difficult to ascertain the amount of compensation which would afford

adequate relief by way of damages for the acts so threatened. The injury from such acts would be great and irreparable. The plaintiff has no plain, speedy or adequate remedy in the ordinary course of law.

Wherefore, plaintiff prays that defendant, Wilfred A. Lerner, his agents, employees and servants, and each and all of them, be perpetually restrained and enjoined from using the names "Lerner's" or "Lerner" in the business of selling women's wearing apparel at retail, or doing any other act which would lead the public to believe that any business conducted by defendant belongs to or is in any way connected with the plaintiff or supplying merchandise emanating from plaintiff; that plaintiff recover judgment against defendant for damages in the sum of \$50,000.00; that defendant be ordered to pay the costs of [8] this suit; that a preliminary injunction of the same tenor and effect as hereinbefore prayed for in respect to said perpetual injunction be issued against defendant; and that plaintiff may have such other and further relief as the circumstances of the case may require and to the court may seem in accordance with equity.

JESSE H. STEINHART,

By S. A. LADAR,

Attorney for Plaintiff. [9]

EXHIBIT. A.

SAN JOSE MERCURY HERALD
(also in San Jose Evening
Wednesday, May 31, 1944 News)

or May 30, 1944.

LADIES

For You Soon

Lerner's

70 South First St.

**WATCH
WAIT**

San Jose News
(Evening)

MERCURY HERALD

Wed. May 31, 1944

Thursday, June 1, 1944

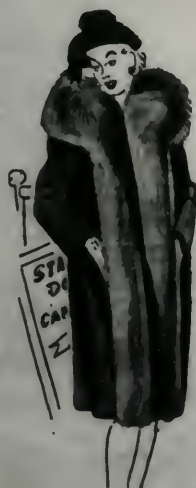
"Tomorrow's Store Today"

Lerner's

70 S. FIRST ST., SAN JOSE

Now Ready for Your Approval

Opening Thurs., June 1



**SAN JOSE'S
Newest, Smartest
Shop for Women**

Offering
New Summer
Clothes
Dresses - Sportswear
Blouses - Sweaters
Advance Fall Coats
and Suits

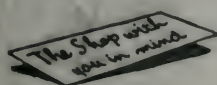


EXHIBIT.C.

SAN JOSE EVENING NEWS, FRIDAY, JUNE 2, 1944

Lerner's

"Youthful Feminine Apparel"

70 S. FIRST ST., SAN JOSE



**Makes A
Spectacular
Entrance!**

Presenting For Your Approval
A Complete Line Of

COATS - SUITS - DRESSES
SPORTS and CASUAL CLOTHES
BLOUSES - SWEATERS - SKIRTS

*The Shop with
you in mind*

EXHIBIT.D.

SAN JOSE EVENING NEWS, FRIDAY, JUNE 9, 1944



Super Fashions

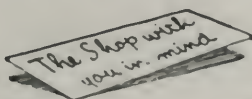
Just arrived _____

new selections for your approval.

May we take this opportunity to express our appreciation for your acceptance of our store.
As always—

Lerner's "Youthful Feminine Apparel"

70 S. FIRST ST., SAN JOSE



State of New York,
County of New York—ss.

Graham Magee, being first duly sworn, deposes and says:

That he is an officer of Lerner Stores Corporation, the corporation herein, to-wit, its Vice President; that he makes this verification for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein set forth on information and belief and as to those matters that he believes it to be true.

GRAHAM MAGEE.

Subscribed and sworn to before me this 28th day of August, 1944.

[Seal] /s/ FRANCES SCHUMACHER,
Notary Public, N. Y. Co. Clk's No. 713, Reg. No.
1089-S-5.

My Commission Expires March 30, 1945.

[Endorsed]: Filed Sept. 7, 1944. [14] .

[Title of District Court and Cause.]

ANSWER

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

(1) As to paragraph 1 of the complaint: Defendant admits that defendant is a citizen of the State of California.

(2) As to paragraph 2 of the complaint: Defendant admits that plaintiff is engaged in selling low priced women's wearing [15] apparel at retail; and denies that plaintiff's business and all of its stores are known, designated or referred to by the purchasing public as "Lerner's" or are associated in the minds of the purchasing public with wearing apparel of the very latest styles or good fashion; denies that plaintiff has for over 28 years last past been continuously engaged in the sale at retail of low priced women's wearing apparel through a group of stores located in the populous cities throughout the United States; denies that plaintiff's business and all of its stores are known, designated or referred to by the purchasing public as "Lerner's" and are associated in the minds of the purchasing public with wearing apparel of the very latest styles and good fashion, at very reasonable prices; defendant avers that he is without knowledge and information sufficient to form a belief as to plaintiff's alleged "specialty," or as to the number and location of plaintiff's stores, and upon that ground denies said allegations and each of them; defendant avers that he is informed and believes and therefore alleges that plaintiff has not legally acquired the goodwill of any predecessor corporation, and that plaintiff's

use of the name of a former corporation is not equitable and conscionable, and comprises a fraud upon the public, as more particularly hereinafter set forth; defendant avers that plaintiff's stores sell at retail and are associated in the minds of the purchasing public as retail stores dealing in cheap merchandise, priced, styled and fashioned accordingly; that defendant deals in women's apparel of a superior grade, at higher prices, a store which presents, in appearance, a distinctive background appropriate to the high grade of merchandise sold therein and substantially different from the appearance of plaintiff's stores; that the goods sold by plaintiff are and have been sold by plaintiff in stores under the designation of "The Lerner Shops" and "Lerner Stores Corporation" which latter designation is the name of plaintiff corporation. [16]

(3) Defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of the complaint, and upon that ground denies said allegations and each of them, except that on the 12th day of July, 1944, the attorneys for plaintiff addressed a letter to the attorneys for the defendant in which it was stated that the plaintiff had "some time ago leased premises in the City of San Jose to be opened as a Lerner store as soon as reconstruction work is permissible."

(4) As to paragraph 4 of the complaint, defendant denies that plaintiff's business has been

increased and developed by means of the continuous presentation to the purchasing public of the name of "Lerner" and denies that by means of presentation of said name, plaintiff has established a large, continuous and profitable volume of sales through the medium of its retail stores, associated in the minds of the purchasing public with the name "Lerner"; and in this connection defendant alleges that plaintiff does not and has not ever expended any effort or money in the presentation to the purchasing public of the name "Lerner" in connection with its retail business in California, and has never advertised or represented or presented itself or its stores as "Lerner" nor is the merchandise sold therein sold under the name of "Lerner"; that plaintiff does no advertising of any kind or description other than by signs on its store fronts, and by printed matter on its packaging, and in this advertising plaintiff consistently does and has used the name "Lerner Shops" and "Lerner Stores Corporation" and none other; and as to the other allegations of said paragraph defendant has no knowledge or information sufficient to form a belief.

(5) As to paragraph 5 of the complaint defendant denies that in May, 1944, and for a long time prior thereto, the name "Lerner" identified in the minds of the purchasing public low-priced women's apparel of the very latest design and good fashion emanating from Lerner Stores Corporation and denies that the name "Lerner" [17] has been acknowledged and accepted by the purchasing pub-

lie throughout the United States and throughout the State of California as identifying the retail stores and merchandise of plaintiff; admits that the name "Lerner Stores" has become identified in the mind of that portion of the purchasing public in close proximity to any store of the plaintiff which knows of plaintiff's stores, as a store which sells low-priced women's wearing apparel under the name of "Lerner Shops" and identifies the merchandise therein as that of "Lerner Shops"; and as to the other allegations therein contained defendant has no knowledge or information sufficient to form a belief.

(6) As to paragraph 6 of the complaint defendant denies that he knew of the good reputation of plaintiff and admits that prior to May, 1944, defendant was engaged at San Francisco, California, in association with his father, L. G. Lerner, in the manufacture and sale at wholesale of women's coats and suits under the business name of "L. G. Lerner"; and in this connection avers that for several years prior to 1944 defendant and his father, L. G. Lerner were engaged in the sale and manufacture of said women's apparel, with principal offices and factory at San Francisco, and that is said business was known, designated and referred to by its customers and purchasing public as "Lerner's Apparel," "Lerner's" and "L. G. Lerner" and "L. G. Lerner's," and were associated in the minds of their customers and the purchasing public with women's cloaks and suits of high quality and fashionable design; that defendant, in as-

sociation with his said father, sold and distributed their said garments throughout the Counties of San Francisco, San Mateo and Santa Clara, among others, in the State of California, and over a period of several years last past, have become known to their customers and to the purchasing public as dealers in women's wearing apparel, operating under the name of "Lerner's", "L. G. Lerner's" and "Lerner's Apparel," and had established a large [18] volume of sales and a profitable business, which said business was known under said names.

(7) As to paragraph 7 of the complaint, defendant admits that he advertised in the San Jose newspapers in the manner set forth in plaintiff's exhibits "A" to "D" inclusive, on the dates therein alleged, but denies that defendant ever used the name "Lerner" as identifying his stores, and denies that he ever used the name "Lerner" in his newspaper advertising or in any other advertising; admits that consistently in his advertising the name "Lerner's" and "Lerner's Apparel" have appeared in script letters, and denies that plaintiff has used similar lettering to identify its stores in San Francisco, which stores are those of plaintiff which are geographically closest to that of defendant in San Jose, and in this connection defendant alleges that all of the signs appearing on plaintiff's stores and on its packages and other advertising media in and on its stores in San Francisco, California, and all of its printed matter bearing plaintiff's name is in block letters, in some cases

the letters in the name "Lerner Shops" appearing on the front of plaintiff's stores in San Francisco are so arranged as to form an inverted "V" thus constituting a legend entirely distinct from that flowing script lettering, sloping upward to the right, consistently and customarily utilized by defendant in all of his advertising. Defendant denies that he has conceived the idea of defrauding, damaging or appropriating, or has defrauded or damaged or appropriated a party or any of plaintiff's good will by engaging, in San Jose, under the name of "Lerner's" in the same business as plaintiff's, and denies that he has caused his said business to be thought of by the public as belonging to plaintiff's group of stores, and denies that defendant's advertisements in newspapers in San Jose and surrounding communities were calculated to convey to the public the idea that one of plaintiff's retail stores was commencing business in San Jose. Defendant [19] alleges that defendant's newspaper advertising in San Jose and surrounding territory was of such character and form as to clearly distinguish defendant's business from that of plaintiff's, in that plaintiff does no newspaper advertising so that any advertising defendant did could not have been a copy or imitation of plaintiff's and that the type of printing used by defendant in his said newspaper advertising was in the distinctive script, as aforesaid, which further clearly distinguished it from that of plaintiff and that the text and formation of said advertising was such as to convey the impression that it referred to a

store dealing in merchandise of high quality, priced accordingly, and thus clearly distinguishing it from plaintiff's stores which deal in low priced goods.

(8) As to paragraphs 8, 9, 10, 11, 12, 13, 14 and 15 of the complaint, defendant admits that since about June 1, 1944, he has engaged in business in San Jose in the conduct of a retail store for the sale of women's apparel and has advertised his business as "Lerner's, San Jose" and "Lerner's Apparel" and denies all the other allegations therein contained; defendant alleges that he did so believing that no confusion with plaintiff would result and that no substantial confusion to the detriment of plaintiff has resulted, for the reason that defendant has in all of his advertising used a distinctive name, form of lettering and type of advertising, and has actively advertised, while plaintiff has not advertised and has not engaged in business in a locality wherein defendant's store is located and plaintiff has no store within a distance of approximately fifty miles from defendant's store; that defendant has dealt in and continues to deal in and intends to continue to deal in a class of merchandise which is superior quality and generally higher in price than that of plaintiff, and operates a store the character and appearance of which is so distinctive and different in every material respect from that of plaintiff's stores that no ordinary person on seeing defendant's [20] store would confuse it with those of plaintiff. That defendant first learned of plaintiff's intimation of alleged confusion shortly after June 30th, 1944, and

immediately thereafter defendant carefully instructed his employees to inform all persons and customers who might raise the point or appear to be under the impression that there existed some connection between plaintiff and defendant, that no such connection existed, and that defendant's store was entirely "home owned" and was not part of any chain of stores, and in particular had no connection whatsoever with "Lerner Stores Corporation" or "Lerner Shops," and that the quality of merchandise carried by defendant was superior to that carried by plaintiff; and thereupon defendant caused all of his newspaper advertising to be so altered as to include the words "Home Owned," prominently displayed, and caused the words "Home Owned" to be placed on the large sign in front of his store, prominently displayed, in conjunction with the words "Lerner's Apparel," and caused a printed sign reading "Home Owned" to be placed in the window of his store, prominently displayed, thereby adequately informing prospective customers that defendant's store was not connected in any way and was not a part of a chain organization such as that of plaintiff; and defendant further, caused a news item to appear in the newspapers of San Jose in which the independence of defendant's store and the fact that it was not a member or part of a chain organization was prominently and clearly brought out; and that thereafter, and further, defendant has given instructions, now being carried out, and has notified plaintiff that the large sign over the front of

his store should be so altered as to add thereto the word "Wilfred" prominently, to the words thereon appearing, so that the said sign will read "Wilfred Lerner's Apparel—Home Owned," Wilfred being the given name of defendant; that defendant's true name is and always has been "Wilfred Lerner" and for many years last past has done all of his business under [21] that name, and in conjunction with his father, for several years last past, had been engaged in the manufacture and sale of women's cloaks and suits in San Francisco, San Mateo and Santa Clara Counties, under the name of "Lerner's" and "L. G. Lerner" and by so doing has created a large and valuable good will. That defendant has lived for several years last past and has done business in the general neighborhood and country surrounding the district in which he now operates his present business and both he and his wife, who is actively engaged in social activities in the same district, are well known in said districts, and enjoy a good reputation, and are generally known in said districts as the "Lerners," all of which are valuable assets to defendant in the operation of said business. That since the opening of defendant's business on the date aforesaid, there has resulted no confusion between defendant's business and that of plaintiff, and to his knowledge no one has been mislead or deceived and further, that in view of the higher character of defendant's store and merchandise any confusion which might arise would be to the advantage of plaintiff and to the detriment of defendant. That defendant is

honestly and justifiably using his own name in the operation of his business, and is so using it in a geographical location in which plaintiff has no store and has no substantial business, and in which location plaintiff has invested neither funds nor effort to promote trade for itself.

Third Defense

Defendant is informed and believes, and upon such information and belief, alleges, that plaintiff is and has been perpetrating a fraud upon the public in the use of the name "Lerner Stores Corporation" and "Lerner Shops" by reason of the following circumstances: Prior to about October 1, 1932, a certain corporation known as Lerner Stores Corporation, incorporated under the laws of the State of Maryland, hereinafter referred to as the predecessor corporation, was engaged in the same business and under the same [22] name as plaintiff. On or about said date said predecessor corporation caused its name to be changed to Realty Corporation of America, or a similar name not indicating any connection with its former name, Lerner Stores Corporation, and thereupon filed a voluntary petition in bankruptcy under said changed name. The purpose of said change of name was to conceal from the public the fact that a corporation by the name of Lerner Stores Corporation had filed a petition in bankruptcy. Thereafter in a manner the details of which are not now known to defendant, plaintiff acquired the business and assets of said predecessor corporation and has

since used the identical name that had theretofore been used by the predecessor corporation. Plaintiff corporation was owned and controlled by the same persons as was the predecessor corporation and the purpose of said transaction above described was to conceal from the public the fact that Lerner Stores Corporation had commenced bankruptcy proceedings.

Wherefore, defendant prays that he be dismissed hence with his costs of suit.

HENRY ROBINSON,

Marcel E. Cerf, Robinson &
Leland

By HENRY ROBINSON,

Attorneys for Defendant.

State of California,
City and County of San Francisco—ss.

Henry Robinson, being first duly sworn, deposes and says:

That I am one of the attorneys of the defendant in this action; that I have read the foregoing answer and know the contents thereof and the same is true of my own knowledge, except as to the matters therein stated on information or belief, and as to those matter I believe it to be true. The reason this verification is not made by the

defendant is that he is absent from the County of San Francisco, in which County I have my office.

HENRY ROBINSON.

Subscribed and sworn to before me this 15th day of November, 1944.

(Seal) LOUIS WIENER,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 15, 1944. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 26th day of April, 1945, before the above named Court, sitting without a jury, Honorable Louis E. Goodman, judge thereof, presiding, Jesse H. Steinhart, Esq., counsel for plaintiff, appearing by John J. Goldberg, Esq., and S. A. Ladar, Esq., and Marcel E. Cerf, Robinson & Leland, counsel for defendant, appearing by Henry Robinson, Esq., and Myron Wiener, Esq., and evidence both oral and documentary having been introduced and the cause submitted for decision, the Court now makes its findings of fact and finds the following facts and each of them, to be true:

FINDINGS OF FACT

I.

Plaintiff, Lerner Stores Corporation, is a [25] corporation incorporated under the laws of the State of Maryland in 1929. Defendant, Wilfred A. Lerner, is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

In 1930, Lerner Stores Corporation, a corporation incorporated under the laws of the State of Delaware, was operating certain retail ladies ready-to-wear stores under the name "Lerner Shops." Three brothers named Lerner were previously operating similar stores and caused the incorporation of plaintiff. The capital stock of said Delaware corporation was owned by plaintiff, Lerner Stores Corporation, said Maryland corporation. In 1932, the assets and good will of said Delaware corporation were acquired by Lerner Shops of California, a corporation incorporated under the laws of the State of California. All of the capital stock of said California corporation was at the time of such acquisition, ever since has been and now is owned by plaintiff, said Maryland corporation. After said transfer of said assets and good will, said Delaware corporation caused its name to be changed to Outfitters Operating Realty Company, and under such name, was adjudicated a bankrupt under the bankruptcy laws of the United States, in 1932. Ever since 1932 said California corporation has

operated said "Lerner Shops" in the State of California. In 1934 said California corporation opened a ready-to-wear store under the name of "Lerner Shops" in the City and County of San Francisco, and another such store in the City of Oakland, California. In 1935 said California corporation opened another such store on Market Street, in the City and County of San Francisco, and in 1940 another such store in Stockton, California. At the time of the commencement of this action, said California corporation [26] was operating twelve such stores in the State of California, of which the only stores in Northern California were said stores in San Francisco, Oakland and Stockton, the remainder being in Southern California, from Bakersfield south, namely, Bakersfield, Santa Barbara, Pasadena, Huntington Park, Inglewood, Long Beach, San Bernardino and San Diego. One hundred sixty-eight other such stores under the name of "Lerner Shops" are owned and operated in forty other states of the United States by various corporations, of which all the capital stock is owned by plaintiff, said Maryland corporation.

III.

Said "Lerner Shops" are without exception, situated in locations having the highest volume of pedestrian traffic, known as "100% locations," and rely in substantial part upon passing pedestrian traffic for their customers. The business of said "Lerner Shops" consists of the sale at retail, of low or popular priced ladies ready-to-wear wearing

apparel. Said "Lerner Shops" do not advertise in newspapers, periodicals, or in any other manner than in the use of the name "Lerner Shops" on the store fronts of the several stores, and the use of such name on paper and bag containers and price tickets attached to merchandise displayed in the show windows of said stores. No variation or abbreviation of the name "Lerner Shops" is used in such advertising. The customers of said "Lerner Shops" consist in substantial part of persons who comprise the pedestrian traffic passing the respective stores, consisting in each instance, principally of persons from within the city and its immediate environs where a "Lerner Shop" is situated, but including some persons from other areas throughout the United States and other places. [27]

IV.

Said California corporation, on or about January 31, 1941, leased certain premises at 152 South First Street, in San Jose, California, with the intention of conducting therein one of such stores. Performance of said lease was guaranteed by plaintiff. At the time of the commencement of this action, said premises were occupied by subtenants of said California corporation, and were not being used by plaintiff or any of its subsidiaries, for the purpose of conducting therein a retail ladies ready-to-wear store, in any manner whatsoever. Defendant had no knowledge of said lease or said intention, at any time prior to the opening of his business in San Jose, California, or at any time prior to about July 12, 1944.

V.

Since about June 1, 1944, defendant has engaged in business in said City of San Jose (a city approximately 50 miles from San Francisco and Oakland) in the conduct of a retail store for the sale of women's apparel and has advertised his business as "Lerner's", "Lerner's, San Jose" and "Lerner's Apparel." Defendant commenced and conducted said business believing, in good faith, that no confusion of the public would result by reason of the use of his own surname, as aforesaid, between his business and the businesses operated under the name of "Lerner Shops," in San Francisco, Oakland and elsewhere. Defendant took reasonable precautions to prevent such confusion and no such confusion has resulted, and there has been no detriment or damage to plaintiff, or to any of said subsidiary corporations, by reason of any conduct, act, or declaration of defendant.

VI.

The store operated by defendant in San Jose is of a character and appearance so distinctive and different in [28] every material respect from that of said "Lerner Shops," that no person of ordinary understanding and intelligence, and no person exercising ordinary care and no ordinarily observant purchaser would confuse it with said "Lerner Shops," or do business with defendant under the reasonable or foreseeable misapprehension that he was doing business with said "Lerner Shops." Defendant has performed no act or made any state-

ment or resorted to any artifice which would confuse, mislead or deceive the public into believing that defendant's store is one of said "Lerner Shops" or in any way connected with said "Lerner Shops" and no persons were so confused, misled, or deceived by any conduct, act or declaration of defendant. Defendant has performed no unfair act or made any unfair statement or resorted to any unfair practice to the detriment of plaintiff or any of its subsidiaries. Defendant advertises in newspapers published in San Jose and circulated principally in the City of San Jose and the immediately surrounding area. Such advertising was of such character and form as to clearly distinguish defendant's business from that of "Lerner Shops" and the text and layout of such advertising was such as to inform the public that defendant dealt in merchandise of generally higher quality and price than said "Lerner Shops" and that defendant catered to a higher class of trade than said "Lerner Shops." The style of lettering used by defendant on his store front and other advertising to display the name of his business is distinctive and different from the lettering used in the display of the name "Lerner Shops," the lettering used by defendant consisting of a continuous line script, arranged to run diagonally upward from left to right, which arrangement and lettering, and the text thereof, were so distinctive and different in every material respect from the arrangement, lettering and text used to [29] display the name "Lerner Shops" that no person of ordinary understand-

ing and intelligence and no person exercising ordinary care and no ordinarily observant purchaser would confuse defendant's store with said "Lerner Shops" or do business with defendant under the reasonable or foreseeable misapprehension that he was doing business with "Lerner Shops," or purchasing the merchandise of "Lerner Shops."

VII.

Said "Lerner Shops" have not been advertised in and about the City of San Jose, and neither plaintiff nor any of its subsidiaries have engaged in the retail ladies ready-to-wear business in San Jose under the name of "Lerner Shops" or under any other name, or under any name including the word "Lerner." Defendant was first in the field in and about the City of San Jose in the retail ladies ready-to-wear business under a name including the word "Lerner." The business of defendant is in a separate and distinct geographical and trading area and in a separate business community from any of said "Lerner Shops." Neither plaintiff nor any of its subsidiaries, nor any of the "Lerner Shops" has or had entered into the retail ladies ready-to-wear field in and about the City of San Jose prior to the time when defendant commenced to do business therein, as aforesaid. Defendant has not done and is not doing business in any field, territory, area or market previously entered or occupied by "Lerner Shops," or any of them, or by plaintiff or any of its subsidiaries, or in which any of said "Lerner Shops" or plaintiff or any of

its subsidiaries were doing business prior to the time when defendant commenced to do business as aforesaid. The business conducted by defendant in San Jose is not in competition with the business of said "Lerner Shops" or any of them, or with the business of plaintiff or any of its [30] subsidiaries.

VIII.

The Court does not find it necessary to make findings on any other issues presented in the pleadings.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court finds:

I.

Plaintiff is not entitled to a judgment or decree restraining or enjoining defendant, Wilfred A. Lerner, and his agents, employees and servants, or any of them, from using the name "Lerner" or "Lerner's" in his existing business of selling women's wearing apparel at retail in and about the City of San Jose, California.

II.

Plaintiff is not entitled to a judgment against defendant for damages, in any amount.

III.

Plaintiff is not entitled to any relief by virtue of the complaint on file herein.

IV.

Defendant is entitled to judgment against plaintiff for his costs herein.

Let judgment be entered accordingly.

Dated: December 26, 1945.

/s/ LOUIS E. GOODMAN,
Judge of the above named
Court.

[Endorsed]: Filed Dec. 26, 1945. [31]

In the District Court of the United States, Northern
District of California, Southern Division

No. 23662-G

LERNER STORES CORPORATION, a Corpora-
tion,

Plaintiff,

vs.

WILFRED A. LERNER,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 26th day of April, 1945, before the above named Court, sitting without a jury, Honorable Louis E. Goodman, judge thereof, presiding, Jesse H. Steinhart, Esq., counsel for plaintiff, appearing by John J. Goldberg, Esq., and S. A. Ladar, Esq., and Marcel E. Cerf, Robinson & Leland, counsel for defendant, appearing by Henry Robinson, Esq., and Myron Wiener, Esq., and evidence both

oral and documentary having been introduced and the cause submitted for decision, and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised, and by reason of the law and the findings of fact as aforesaid; and

Good Cause Appearing Therefor:

It Is Ordered, Adjudged and Decreed as follows:

I.

Plaintiff is not entitled to a judgment or decree restraining or enjoining defendant, Wilfred A. Lerner, [32] and his agents, employees and servants, or any of them, from using the name "Lerner" or "Lerner's" in his existing business of selling women's wearing apparel at retail in and about the City of San Jose, California.

II.

Plaintiff is not entitled to a judgment against defendant for damages, in any amount.

III.

Plaintiff is not entitled to any relief by virtue of the complaint on file herein.

IV.

That defendant have judgment against plaintiff for his costs herein, taxed in the amount of \$.....

Dated: December 26th, 1945.

LOUIS E. GOODMAN,
Judge of Said Court.

[Endorsed]: Filed Dec. 26, 1945. [33]

[Title of District Court and Cause.]

NOTICE OF MOTION OF PLAINTIFF, LER-
NER STORES CORPORATION, A COR-
PORATION, FOR A NEW TRIAL

To the above entitled Court and to the Clerk there-
of; to the Defendant above named and to Mar-
cel E. Cerf, Robinson & Leland, Esqs., Attor-
neys for Defendant:

You and each of you will please take notice that on Monday, the 14th day of January, 1946, at 10 o'clock a.m. of that day or as soon thereafter as counsel can be heard at the courtroom of the above-entitled court, Honorable Louis Goodman, Judge thereof, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, the plaintiff above named will move the above entitled court for a new trial and will request the court to open the judgment entered herein and amend the findings of fact and conclusions of law or to make new findings of fact and conclusions of law in the form set forth in plaintiff's memorandum served and filed herewith, and direct the entry of a new judgment herein in conformity with such changed [34] findings of fact and conclusions of law. Said motion and request will be made upon the following grounds:

1. Insufficiency of the evidence to justify the decision;

2. That the decision is against law;

Said motion will be based upon the minutes of

the court, the pleadings, records, papers, documents and evidence on file in said action, and the said plaintiff's memorandum served and filed herewith.

JESSE H. STEINHART,

By JOHN J. GOLDBERG,

Attorney for Plaintiff.

[Endorsed]: Filed Jan. 5, 1946. [35]

District Court of the United States
Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 30th day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: the Honorable Louis E. Goodman, D. J.

[Title of Cause.]

Ordered plaintiff's motions for a new trial and to amend findings denied. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that Lerner Stores Corporation, a corporation, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for

the Ninth Circuit from the final judgment entered in the above entitled action on December 26, 1945.

Dated: April 29, 1946.

JESSE H. STEINHART,

By /s/ JOHN J. GOLDBERG,

Attorneys for Appellant, Lerner Stores Corporation, a Corporation.

MARCEL E. CERF,

ROBINSON & LELAND,

Attorneys for Defendant.

[Endorsed]: Filed April 29, 1946. [37]

[Title of District Court and Cause.]

DESIGNATION BY PLAINTIFF OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

Comes now Lerner Stores, a corporation, plaintiff above named, and having filed herein its notice of appeal to the Circuit Court of Appeals, hereby designates for inclusion and to be contained in the record on said appeal the complete record and all proceedings and evidence in the above entitled action including, but not in limitation of the fore-

going all pleadings, the findings of fact and conclusions of law, the judgment, all of the evidence received at the trial of said action, including the testimony of the witness and all exhibits, a transcript of the proceedings on the hearing of plaintiff's objections and proposed amendments and additions to [38] findings of fact and conclusions of law proposed by defendant and a transcript of the proceedings on the hearing of plaintiff's motion for a new trial.

Dated: May 3, 1946.

JESSE H. STEINHART,

By JOHN J. GOLDBERG,

Attorneys for Appellant, Lerner Stores Corporation, a Corporation.

(Receipt of Service.)

[Endorsed]: Filed May 3, 1946. [39]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. C. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 39

pages, numbered from 1 to 39, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Lerner Stores Corporation, a corporation, Plaintiff, vs. Wilfred A. Lerner, Defendant, No. 23662-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 4th day of June, A.D. 1946.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk. [40]

In the Southern Division of the United States
District Court in and for the Northern Dis-
trict of California

Before: Hon. Louis E. Goodman, Judge.

No. 23662-G

LERNER STORES CORPORATION, a corpora-
tion,

Plaintiff,

vs.

WILFRED A. LERNER,

Defendant.

REPORTER'S TRANSCRIPT

Thursday, April 26, 1945

Counsel Appearing: For Plaintiff: Jesse H. Steinhart, Esq., by John J. Goldberg and Sam A. Ladar, Esq. For Defendant: Marcel E. Cerf, Esq., Robinson & Leland, by Henry W. Robinson, Esq.

The Clerk: Lerner Stores Corporation v. Wilfred A. Lerner.

Mr. Robinson: Ready, your Honor.

Mr. Goldberg: Ready, your Honor.

The Court: You may proceed, gentlemen.

Mr. Goldberg: If your Honor please, on behalf of the plaintiff I would like to make a very brief statement. [1*]

I know that your Honor is familiar, or was at

* Page numbering appearing at top of page of original Reporter's Transcript.

one time familiar generally with the nature of this case. It is an action to enjoin the defendant, Wilfred A. Lerner, from doing business under the name of Lerner's, which is the name he was doing business at the time the action was commenced; or to use the name "Lerner" at all in the type of business, which is the sale at retail of ladies' wearing apparel; and for damages.

The plaintiff in this action and its predecessors in interest have since 1907 continuously used it as a name "Lerner" in the sale at retail of women's wearing apparel. Mr. Samuel A. Lerner, who was living in Oakland at that time, went to New York City and there engaged in the business, first, of manufacturing wearing apparel, and then in selling wearing apparel in the retail stores. He was joined by two brothers, Michael Lerner and Joseph Lerner. They expanded their operations from one store to approximately 180 stores now; and from one city to approximately forty-one States; from a nominal volume to a volume last year of \$87,000,000.

As the evidence will show, it was a matter of hard work, of plowing earnings back into business, paying close attention to business, of building up a valuable goodwill throughout the entire country as "Lerner's." We will show that the name is Lerner Corporation, and the sign on the windows is "Lerner Shops." Yet in the organization itself and in the [2] minds of the public and in actual use the name of this organization is "Lerner's" and its merchandise is referred to as "Lerner's."

We will show that it has a distinctive type of merchandise in that it is of the most up-to-date styles, that it sells under a policy which enables the company to obtain very reasonable prices which are below comparable prices for the same articles for the same general area. It is now the largest apparel chain in the world. There is no other apparel store anywhere in California or anywhere on the West Coast that uses "Lerner" in any part of its name except the defendant, Wilfred Lerner, in San Jose.

We will show this company from its idea at the beginning has had a definite expansion policy. It has expanded at every opportunity, according to a definite plan of beginning inside their stores, in populated areas, and making itself and its merchandise known in the outlying areas, through its merchandising policy and the opening of its stores in the outlying areas. In pursuit of that policy, in 1941 the company negotiated a lease in San Jose on the very same street the defendant has opened a store, and on the same block, on the same side of the street, and obligated itself to make a lot of repairs and contemplated a complete reconstruction of the premises. This lease had its beginning on July 1st, 1942. There were two stores there. The area is about thirty-five or [3] forty feet, and the entire area was intended to be used by the company for the operation of one of its stores. This lease, as a matter of fact, compels the company to use the premises for the operation of one of its stores with the exception of being permitted to sub-

let a space not exceeding ten feet wide by one hundred feet deep to somebody else; but everything else must be operated by this company as one of its regular stores in the customary manner and it is on the percentage basis.

However, when the lease term commenced, the war commenced and there were restrictions which prevented the company from engaging in the substantial reconstruction required. As a result, the company has continued to sublease or sublet the premises at a rent less than it is obligated to pay as a minimum rent, and which it is paying.

We will show, furthermore, that in addition to this lease in being a part of its normal expansion program and one that was well visualized years before that, actually, San Jose and the area between here and San Jose is within the normal trading area, actual trading area of the store of Lerner's in San Francisco. The two stores in San Francisco and the one store in Oakland are in the normal trading area for other large retail organizations in the Bay Area. They have actual customers from San Jose, regularly and continuously in a substantial amount.

We will show, furthermore, that there has been actual [4] confusion in the minds of the public as to whether or not the store of the defendant at San Jose is a store of the plaintiff, that certain people have confused it and certain people have come to believe that the merchandising policy of the company has changed in that they were not treating their people the same way in San Jose as in the other stores with which these people were familiar.

We will show, furthermore, so far as the defendant is concerned that he has never been in the retail business before in any line; that he never had a place of business before in San Jose, that he did not live in San Jose when this store was opened by him; that he did not open it under his name, which is Wilfred Lerner; but he opened it as "Lerner's;" that he advertised for approximately two weeks purely as "Lerner's" without indicating in any way that he had any type of merchandise that the plaintiff didn't have or any price line which plaintiff didn't have. He advertised, primarily, the name "Lerner's," which we will show did not refer to him, but referred only to the plaintiff; that after the plaintiff told him of this cause of action and a very long time after the complaint had been made the defendant made some changes, half-hearted changes in the way he designated himself in his business.

We will show, and I think the cases will show, that that in and of itself is not conclusive and wouldn't have been [5] conclusive in the first place; and in the second place could not undo the damage which the defendant has done to the plaintiff, not only in the matter of actual confusion of customers in particular transactions, but in the damage to the reputation of the plaintiff, which is long established, well known among the people who deal with and know about the plaintiff; and that the defendant has, either wittingly or unwittingly, which is for your Honor to determine—and I think it is immaterial under the circumstances—masqueraded as

the plaintiff and has damaged the reputation of the plaintiff; that under those circumstances it would not be equitable to permit him to continue in that business under a name which contains the name of Lerner's, that while his name is "Lerner" the circumstances under which he commenced this business and has continued it are such that we are now justly and equitably entitled to require that he carry on his business under a name which does not contain that of "Lerner" in order to prevent any further confusion which is bound to exist, even though he may have had some qualifying allegation to the name under which he has been doing business for most of the time since June, 1944.

The Court: This is a suit under unfair competition?

Mr. Goldberg: Yes, your Honor.

The Court: I am not quite clear as to what the taking of this lease at San Jose has to do with this case. [6]

Mr. Goldberg: It is only one of the elements in the proof that the plaintiff is not only doing business with the people in San Jose, but in the normal expansion of and expanding a business having a history of expansion, having a policy of expansion, that in their normal expansion policy, San Jose is within the area where this company would normally do business under the name of "Lerner's." "Lerner's Shops" is known to the public as "Lerner's."

The Court: Of course, if somebody else opened a store which was not in unfair competition in any

way, it wouldn't make any difference if plaintiff had a lease.

Mr. Goldberg: I don't believe it would militate against the plaintiff's claim if it didn't have a lease there. I think the fact it has a lease merely corroborates its policy of expanding into that area.

The Court: That it intended to go to San Jose?

Mr. Goldberg: Yes, that it plans to go to San Jose.

The Court: Of course, that wouldn't have any relevancy unless it was unfair competition.

Mr. Goldberg: I think that is true. If this company's stores had all been in New York and its reputation was confined to New York, and if it decided to open a store in San Jose, I think the matter of the lease might be material.

The Court: I had this matter up on pre-trial. It seemed to me at the time the question was whether, first [7] of all, the way the defendant conducted his business was by way of unfair competition; and secondly, whether it was within an area, or the field within which unfair competition would have been followed.

Mr. Goldberg: That is true, but I think that in the matter of unfair competition there are two elements, and, I think, well established in the authorities, first, whether or not the area involved, San Jose, is within the trading area of the company's existing stores; and secondly, whether it is within a normal expansion area of a company having a policy of expansion; in other words whether nor-

mally that is the place they would go next, or where they are known.

The Court: Doesn't it amount to this, that if the San Jose area was within the trading area of San Francisco, a man could still open the same kind of a store down there, unless it did not have the effect of deceiving the buying public into believing it was a store of the plaintiff's. The trading area doesn't have anything to do with it unless there is an attempt to pirate or deceive the public. It wouldn't make any difference whether it was ten miles or one mile away.

Mr. Goldberg: Aside from this question of intent. If this man opened a similar store but without any elements involving any infringement of the plaintiff's rights, any confusion or deception of the public, then, I don't think we would have any problem. [8]

The Court: Supposing he opened a store at Gilroy and it appeared as if he were setting himself up as a Lerner's store, it might be that is unfair competition, too. On the other hand, if he opened a store at Millbrae, or San Mateo, just a few miles below San Francisco, it shouldn't have the effect of any deception. There wouldn't be unfair competition.

Mr. Goldberg: Of course, we stand with the proposition that the name "Lerner" is used by both parties and we know that there is bound to be some confusion in people in the same line of business using the same name if the name of the style or user is well known and has been known to prospective patrons in that area.

The Court: That was what I was endeavoring to say.

Mr. Goldberg: Yes.

The Court: If he opened a store in Ukiah and nobody knew about Lerner Stores, there wouldn't be any difference whether he used the same name or continued at his business in the same way; and nobody would be deceived because they wouldn't know about Lerner's Stores.

Mr. Goldberg: That would be true, subject to one qualification that seems to be pretty well established; and that is, if it could be said on the basis of all the history that Ukiah was within the normal expansion area and that the company was in all likelihood going to go into Ukiah or with the name "Lerner" the defendant might have a problem. [9]

The Court: I think that that would have to be within certain reasonable limitations; because otherwise some firm that established itself through its efforts over some area could assume nobody would go into business anywhere in the United States, because the whole country would be its area of expansion. You would have to have very definitely reasonable limits to that.

Mr. Goldberg: Yes, but they are in practically in every state.

The Court: I don't want to interrupt you, but I wanted to get that clearly in my mind.

Mr. Goldberg: Yes, your Honor.

Mr. Robinson: I may say I had intended to point out to the Court personally the things which the Court itself has pointed out to Mr. Goldberg.

May I proceed, first, upon the theory that Lerner Stores Corporation by reason of its prior use of the name "Lerner" can legally prevent Wilfred A. Lerner the defendant, from using his own name in his own business. That is the assumption that is made by Mr. Goldberg; that if other elements were present, that is, if the two stores were side by side in the same city, leaving aside the geographical question for the moment, the law gives the Lerner Stores the right to prevent Mr. Lerner from using the same name. The second theory [10] seems to be that by reason of the use in San Francisco and elsewhere, the Lerner Stores Corporation may preempt the entire field and Mr. Goldberg intimates that is his reasonable conclusion from his statement that on that theory anybody, even someone not named "Lerner," but anybody else who wanted to use the name Lerner—let us assume it is a name capable of appropriation as against another one who has not that family name—they have the right to preempt it in certain places where they intend to go in the future.

There is the point which the Court called attention to Mr. Goldberg, which is one of the real points in the case, and that is whether or not regardless of whether it is San Jose or Gilroy or any other place, whether these two establishments are in fact competing with each other. And that is a mere element in the ultimate decision and it is not the controlling element; but it is one of the things, for example, what I had in mind: Two stores across the street from each other or a block away

from each other would not have to be greatly dissimilar in order to play fair with the public and with each other; whereas, if one of them were at Gilroy or Fresno, and the other was in San Francisco, some similarity might not lead to confusion, whereas that same similarity in the same neighborhood might lead to confusion. So that, in that effect, the distance between the stores may or may not be material. [11]

By discussing the question of similarity I don't mean to intimate there is any charge of similarity here. As a matter of fact, there is great dissimilarity.

The Court: That is the real question of fact, I suppose, in the case.

Mr. Robinson: Yes, that's right. Now, before stating the facts, I think I might call to the attention of the Court and to Mr. Goldberg a case which he has apparently overlooked, because from the tenor of his remarks it is obvious that he is proceeding on the theory the name of "Lerner" is exclusive appropriation to his client.

I am reading from 73 Cal. App. 412, where the Court quotes from a California case:

"The right to do business under one's own name is one of the sacred rights known to the law, and a family name is incapable of exclusive appropriation and cannot thus be monopolized."

That disposes of Mr. Goldberg's first point, namely, that the mere fact that the Lerner Corporation has in it some members of the family named

Lerner, that that gives them the actual right to use "Lerner."

The Court: There are lots of other cases on the subject. I think people who have the same family name have been restrained many times from pirating the names.

Mr. Robinson: That's right, if it is fraud or deception. [12] I may say at the outset there is a difference between a products case and a widely advertised case of conflicting advertising.

The Court: There are cases of a similar nature and most of the cases where they deal with family names are products cases.

Mr. Robinson: I don't know of any case where a name on the store was enjoined in the absence of a deliberate attempt to defraud or deceive.

The Court: I don't want to interrupt you, but I think it is time to develop the facts. The important question is here, how is the defendant conducting his business?

Mr. Robinson: In point of confusion, the cases are to the effect where there is a different type of name—confusion is an element in trade name cases, but not family name cases where confusion is the result of the circumstances themselves, that the two parties have the same name, neither can be enjoined.

The Court: I am not so sure about that. If your client opened his store right next to the Lerner's in San Francisco in the same block, using the same name and doing the same kind of business,

There wouldn't be refuge in that because he had the same name.

Mr. Robinson: I am merely outlining what the law is, but I would say that the situation as we will present it will [13] show that there are adequate distinctions and that we need not rely on this absolute statement that we haven't an absolute right to interfere with these people.

The situation as we will present it is this: Wilfred Lerner was engaged with his father for many years, since sometime in the '30's, in the business selling at wholesale, manufacturing and selling ladies' coats and dresses, that in the course of that business they sold to retail outlets such as he himself is doing now, and in the course of that business he became familiar with the retail ladies' ready-to-wear business and decided in 1938 or 1939, or even earlier, that he was going to go into the retail business for himself when an appropriate time came, that about nine years ago, or about nine years prior to the commencement of the action, he took up his home in Palo Alto, where he lives with his wife and daughter, that while living in that community, he commuted to San Francisco to continue the business with his father. They did business under the name of L. G. Lerner. While living in that community he had in mind his intention of going in business down there and had in mind the intention of going in business under his name. I don't know at the moment whether Lerner Brothers were in business in 1936. That will come out in the proof. In 1939, for the first time, he got as

far as negotiating for a lease. Again, in 1940 or 1941, he negotiated for another lease and the deal [14] fell through; and finally, early in 1944, he was successful in obtaining this place. That he would have moved to San Jose from Palo Alto immediately upon making the lease for the store, but the housing situation being what it was, that his residence was not actually taken up at San Jose, though he rented the premises sometime before until a few days after the opening of his store, June 1st, 1944, that he opened up under the name "Lerner," that he used a distinctive script of lettering; whereas the plaintiff here, so far as we know, uses strictly blocked letters and uses the name "Lerner Shops" or, "The Lerner Shops."

The reason he desires to use his own name is that his wife and himself were active in the community activities down the Peninsula. His wife belonged to a number of organizations, Red Cross, relief organizations, social and charitable organizations; that that organization work took her frequently into San Jose; that these chapters were frequently centered in San Jose and these people are well and widely known in Palo Alto and in San Jose and they have a pride in their name and want to use it for that reason. They never knew anything about the intention of Lerner Shops to go down there. They ran a few opening ads merely saying, "watch for the opening of Lerner's," or words to that effect. They advertised about once a week; so there were three ads run between the end of May

and the 9th of June. The store opened on the 1st or the 2nd. [15]

The advertising, incidentally, is only in the San Jose papers. There is one morning and one evening newspaper and, as I say, one ad a week was used. So there were three or four ads from the end of May to the 9th of June, which were institutional ads, merely advertising the opening of Lerner's without indicating any type of merchandising or anything of that kind; and after the 9th the ads were advertising merchandise with the name being at the bottom of the cut. Then, about July 12, Mr. Lerner received a letter from plaintiff's counsel telling him that he was infringing upon their rights and also informing him about the reason, which was the first information they had that they ever intended to come down there and demanding he desist from the use of his name. Subsequently, as your Honor knows, negotiations ensued so that the parties could be appeased and each counsel went their respective ways using such names as they desired without putting it in issue here, so to speak. Things fell through and we are here today. In the meantime, however, Mr. Lerner has done this: As I say, the original sign was in script over the place of business, sixteen feet wide, a distinctive script prepared by an artist, I believe, with the word "Lerner's" and under the word "apparel." Immediately after the receipt of the letter from plaintiff, Mr. Lerner added the words "home-owned," to his sign and to his advertising; that thereafter, after negotiations and discussions he proposed to

add the words, "W. A." to "Lerner's" and [16] plaintiff indicated he wouldn't be satisfied with that. So Mr. Lerner added the word "Wilfred." So the sign now reads, "Wilfred Lerner."

I may say that Mr. Lerner decided to keep the possessive form of "W. A. Lerner's" or "Wilfred Lerner's," but the plaintiff objected to that; although in my opinion the dropping of the possessive makes the name more nearly like "The Lerner Shops" because the possessive itself, I think, is a distinction. So the possessive was dropped for that reason and not for reasons of our own; and then the word "Wilfred" was added. So the name now used is, "Wilfred Lerner, apparel, home owned."

It is true the name "Wilfred" is not in the same size as the name "Lerner," but it is also true that the name "Wilfred" is so large as to be unmistakable.

In the case we cited in our memorandum, I believe the Horlick case, where it was claimed that the first name of the defendant should be in the same size as the second name, the surname. Those were products cases, and consequently, of course, the sign was maybe one-eighth of an inch high; and if the first name wasn't in the same size as the surname it wouldn't be there at all. But here we have a case where the surname is, say, three feet high and the first name is perhaps a foot and a half high, or in that general proportion, and it can be seen by anybody of reasonable visual perception that there is absolutely no chance for mistake or [17] confusion, and there has never been anything

done intentionally to pirate the business of the plaintiff.

On the contrary, the two are engaged in a slightly different type of business. Mr. Lerner caters to a higher class. I understand there are three types in this business, three classifications, one is called "low end," another is called, I believe, "popular priced," and the third is called "specialty." Our contention is Lerner's is sort of in between "low end" and "popular priced." "Higher priced" doesn't make it cater to large volume, and the specialty would include such stores as Magnin's; that is, I. Magnin and Joseph Magnin, who seem to get along together, who seem to get along without pirating each other, and they are in the same city and, I believe, in the same block. Those are called "specialty," but I would have called them "exclusive." There is that type.

There is no contention and no possibility to contend that there is anything in the appearance of the stores, the appearance of the wrappings, that is similar, and Mr. Lerner believes it would be to his disadvantage to be taken for one of the Lerner chains, and does desire to do everything that is reasonable to avoid that confusion; but still reserving the sacred right to use his own name. I don't mean that in a derogatory sense to Lerner's or derogatory to the merchandise, but just that the two things are different. But here you have a different classification and Mr. Lerner does not choose to [18] be in that classification.

The Court: We will take a five-minute recess.

Mr. Goldberg: I would like to make one statement for the record, and that is in connection with the statements about possible adjustments. All of these were negotiations and we never had, if your Honor please, at any time any authority from the plaintiff to adjust on any of the bases mentioned. So, I think so far as this record is concerned, it should appear that there was never any proposal on the part of the plaintiff to adjust, except in accordance with the principle of the complaint. There were discussions between counsel which didn't reach the point where they were authorized by the plaintiff.

The Court: Well, at least they were discussed in open court.

Mr. Goldberg: Yes.

The Court: There was a pre-trial conference, and as I remember it, there were photographs submitted to me, and the conference was continued from time to time to see whether or not the litigation couldn't be terminated by making some changes.

Mr. Goldberg: Your recollection is correct, your Honor, and it went this far, that we, representing the plaintiff, sought to obtain from the defendant certain adjustments which we had then submitted to the plaintiff, but we didn't obtain [19] it from the defendant. So we weren't able to submit it.

The Court: We will have a five-minute recess.
(Recess.)

The Court: You may proceed.

Mr. Goldberg: Mr. Magee, please.

GRAHAM MAGEE,

called as a witness by the plaintiff; sworn.

The Clerk: Will you state your name to the Court?

A. Graham Magee.

Direct Examination

By Mr. Goldberg:

Q. Mr. Magee, where do you reside?

A. In New York City.

Q. What is your occupation?

A. I am an official of the Lerner Stores Company.

Q. What is your position in the company?

A. Vice-president and assistant secretary.

Q. How long have you been with that company?

A. Since January, 1929.

Q. Where is that company incorporated?

A. In the state of Maryland.

Q. And qualified to do business in California?

A. Yes, it is.

Q. Are you familiar with a company known as the Lerner Shops of California, Incorporated?

A. Yes, I am.

Q. Do you know who is the owner of the stock of that company? [20]

A. The capital stock is owned by Lerner Stores Corporation, the plaintiff in this action.

Mr. Robinson: Pardon me, I didn't get the name of the California corporation.

Mr. Goldberg: Lerner Shops of California, Incorporated.

(Testimony of Graham Magee.)

Q. It is a wholly owned subsidiary of the plaintiff? A. That is correct.

Q. Does Lerner Shops of California, Incorporated, operate any places of business in California?

A. They operate all our stores in California.

Q. How many stores?

A. We are presently operating thirteen stores in the State of California.

Q. Are any of them in or about the San Francisco Bay Area?

A. Yes, we have two in San Francisco; one on Market Street and one on Grant Avenue.

Q. The one on Market Street is where? What is the number?

A. It is adjoining the Emporium.

Q. That would be between Fourth and Fifth Streets? A. That is correct.

Q. And the number is 871?

A. That is correct.

Q. How large a store is that? What is the frontage?

A. The frontage of it is eighty feet, and the depth of the store, approximately 258 feet.

Q. What floor area do you occupy?

A. We occupy the first floor and entire second floor of the building for selling, and [21] we use the basement for storerooms.

Q. Do you have any arrangement for using any additional space in that store?

A. We have leased the entire commercial build-

(Testimony of Graham Magee.)

ing; contemplate occupying the entire property at a subsequent date.

Q. What is the frontage of that property?

A. Eighty feet.

Q. And how many stories does it have?

A. It is a ten-story building.

Q. The remaining portion of the frontage is now occupied, is it? A. Yes, it is.

Q. By whom?

A. By Edison Shoe Stores and the entrance to the building.

Q. Can you tell us who originally—withdraw that. Let me ask you, first: What is the nature of the business that is done in these stores in the Bay Area?

A. We are in the retail business, selling women's wearing apparel, which consists of coats, suits, furs, underwear, hosiery, sportswear, millinery and bags.

Q. Did you say dresses? I don't recall.

A. Dresses.

Q. Is there any difference in what you carry in the various stores in the country?

A. It would vary only to the size of the store. In other words, it would be the same merchandise throughout the United States.

Q. What about the styles? Are they any different in the different parts of the country?

A. You would have different [22] colored merchandise in different sections of the country, but the styles are pretty much the same throughout the United States.

(Testimony of Graham Magee.)

Q. What about the prices?

A. The prices are uniform; in other words, we sell for the same price in San Francisco as we do in New York City.

Q. Is that true of chain stores generally?

A. It is not true generally, because only a few of chain stores have that policy.

Q. Where it is not true, what is the difference in prices?

A. As an illustration, Montgomery Ward would have an increase in price on a dress of seventy-five cents which would cover the additional shipping costs, which we absorb.

Q. With respect to the type of merchandise that you carry in each category, as to whether or not it is an up-to-date style, or what it is, can you tell us?

A. It is modern, up-to-date merchandise, popular priced.

Q. When you say "popular priced," you heard the statement counsel for the defendant made in his opening statement about low-end merchandise? Does plaintiff's stores carry low-end merchandise?

A. No, we do not.

Q. You would characterize it as popular priced.

A. That's right.

Q. With respect to the prices at which the same articles or comparable articles are sold in other stores, can you tell [23] us whether there is any difference in that and the Lerner's prices?

A. We undersell department stores, as an illus-

(Testimony of Graham Magee.)

tration, by one to two dollars per garment, when you are dealing with coats or dresses. In a similar way with other items or merchandise.

Q. Do you have any policy with respect of exchanges of merchandise among the stores.

A. A customer can buy a dress in San Francisco and exchange it in New York City and get money back, or change the size, or get a credit slip, which is good in any store in America that we operate.

Q. With respect to the locations of stores, taking the Bay Area, and then, also, your general policy, what is the policy with respect to the location within a community of your store?

A. We endeavor to locate our stores in what is known as a one hundred per cent location; that is, where there is the highest pedestrian traffic.

Q. Is that true with respect to your stores in the Bay Area? A. That's correct.

Q. Taking the store on Market Street, how does that rate so far as its retail store value is concerned?

A. It is the highest trafficked block in the city of San Francisco.

Q. Are there any other stores in that block?

A. You have the Emporium, and you temporarily have the Hale's Store in the old Penney location, and you have Grayson and Edison Shoe Store; Owl Drug, and the other end where Hale's is going [24] to be located you have a number of tenants.

(Testimony of Graham Magee.)

Q. Is Woolworth's in that block?

A. Yes, Woolworth's is in that block.

Q. With respect to your store, you have another store in San Francisco.

A. Yes, we have a store adjoining the White House on Grant Avenue.

Q. How long have you had these stores in San Francisco?

A. We opened the store on Grant Avenue in 1934; and we opened the store on Market Street in 1935.

Q. When did you open the Oakland Store?

A. I believe it was around the same date, 1934.

Q. In Oakland what sort of location do you have?

A. In Oakland we are at the corner of Twelfth and Washington. It is the highest trafficked corner in that city. We are on the Masonic Temple property.

Q. Are there any other national chain stores that have stores in that vicinity?

A. Oh, yes, most of the chain stores are located in close proximity. W. T. Grant Company and Edison Shoe Stores have stores there, too.

Q. Can you tell us where the other stores in California are?

A. Well, starting at San Diego, we come up to Los Angeles, and we have a number of stores immediately surrounding Los Angeles, such as Inglewood, Huntington Park, San Bernardino,

(Testimony of Graham Magee.)

Santa Barbara—Inglewood—I think I mentioned that before.

Q. Do you have anything that would refresh your recollection [25] as to where your stores are located?

A. Our annual report would indicate——

The Court: I don't suppose that is disputed. Why don't you read them.

Mr. Robinson: Read the dates when they were opened.

Mr. Goldberg: Q. If I haven't the dates, Mr. Magee, can you tell me the dates? Let us do this in alphabetical order? Take Bakersfield?

A. I have to approximate the date. I would say we opened at Bakersfield in 1943.

Q. Fresno? A. Fresno in 1944.

Q. Huntington Park? A. 1942.

Q. Inglewood? A. 1942.

Q. Long Beach?

A. Long Beach, we opened in, I would say, in 1931.

Q. Oakland, you have testified to?

A. Yes.

Q. Pasadena? A. Pasadena in 1930.

Q. San Bernardino? A. 1930.

Q. San Diego? A. 1930.

Q. And the San Francisco stores you have testified to? A. Yes.

Q. Stockton? Did I mention Santa Barbara?

A. Santa Barbara we opened in 1930.

Q. Stockton?

(Testimony of Graham Magee.)

A. Stockton we opened in 1940.

Q. Now, in addition to those thirteen stores in California, have you made any commitments for the opening of any additional stores in California?

A. We have fourteen locations which we [26] have already leased or purchased in the State of California for future stores.

Q. It might be helpful, perhaps, if I were to read this and have the witness determine whether those are the ones. I am reading from the annual report, and will you tell me if these are the additional locations: Beverly Hills, Burlingame——

A. Yes.

Q. Glendale? A. Yes.

Q. Hollywood? A. Yes.

Q. Los Angeles? A. Yes.

Q. Modesto? A. Yes.

Q. Palo Alto? A. Yes.

Q. Riverside? A. Yes.

Q. Sacramento? A. Yes.

Q. San Jose? A. Yes.

Q. San Mateo? A. Yes.

Q. Santa Monica? A. Yes.

Q. Vallejo?

A. Yes. I think we have subsequently taken Ventura.

Q. Oh, I see Ventura is here. I omitted to mention that.

Mr. Robinson: I think I should state that it should be understood that we object to the competency, relevancy, and materiality of this testi-

(Testimony of Graham Magee.)

mony as to future plans and future intentions in any other cities, particularly, in the city of San Jose.

Mr. Goldberg: I might say we have that testimony and [27] have offered it solely to support our contention and in line with the principle that we are an expanding organization and have definite plans for expansion, have expanded in the past and have definite plans in the future; and I believe it is relevant in that connection.

The Court: I will allow it and determine its weight when I decide the case.

Mr. Goldberg: Q. Mr. Magee, can you tell us who started this original Lerner business?

A. The business was started by Samuel A. Lerner in 1907.

Q. Where did he live immediately before that?

A. He had lived for a number of years in Oakland, California.

Q. What was his business at that time?

A. He was then a traveling salesman for the D. N. & E. Walter Company, a San Francisco carpet company.

The Court: Mr. Goldberg, I don't want to disturb the preparation of your case, but why do I have to hear all this preliminary history of the company? Isn't it most important that I know what the company does now?

Mr. Goldberg: I think it has this bearing, and I will be glad to make the statement, if the Court please: That I believe it should be in the record

(Testimony of Graham Magee.)

that this business was commenced by Samuel Lerner in 1907, and that he is still actively connected with the company.

The Court: You mean in connection with the use of the [28] name "Lerner"?

Mr. Goldberg: Yes, in connection with the name "Lerner" and to show that parties of that name are attached to that business.

The Court: All right.

Mr. Goldberg: Q. Is Mr. Lerner still connected with the business? A. Yes.

Q. In what capacity?

A. He is chairman of the board and vice president.

Q. Are there any other persons associated with him or his family?

A. Yes, J. J. Learner is president of the company, and Michael Lerner is vice-president and treasurer of the company. [29]

Q. How long have they been associated with the company?

A. I would say since 1919. Michael Lerner was a salesman for Samuel Lerner when they were in the manufacturing business.

Q. In other words, the older generation of Lerner's.

Mr. Robinson: Now, just a minute: Do I understand this present business started in 1907, or that this is the successor of some previous business?

Mr. Goldberg: Q. What was the name of the company that was in business?

(Testimony of Graham Magee.)

A. Lerner Waist Company.

Mr. Robinson: Q. Was it a manufacturing company?

A. It was a manufacturing company.

Mr. Goldberg: Q. When did they first open stores? A. In 1919.

Q. In addition to the older generation of Lerner's you mentioned, are there any sons?

Mr. Robinson: We still haven't the answer to the question I have asked.

Mr. Goldberg: I don't think we ought to have the examination interrupted.

The Court: No, I don't think so, either.

Mr. Robinson: I wanted to ask——

The Court: He said it was a manufacturing business and they didn't open stores until 1919. Go ahead, now, Mr. Goldberg.

Mr. Goldberg: Q. Mr. Magee, are there any other Lerner's [30] in the same family that have been connected with the business?

A. They have two of Joseph Lerner's sons connected with the business who are now in the service. One is a German prisoner and one is in the United States. There is another son of Samuel Lerner who is a lieutenant in the Army Air Intelligence, who is connected with the business.

Q. He was in the business before he went in the service? A. That's right.

Q. In 1919 you say your stores were first opened. Can you tell us what company opened those stores?

(Testimony of Graham Magee.)

A. The corporation was known as "Lerner Blouse Corporation." It had acquired the assets and good will of the Lerner Waist Company, the manufacturing company.

Q. Did that Lerner Blouse Company continue under that name?

A. In 1925 the name was changed to Lerner Stores Corporation.

Q. When did the plaintiff corporation come into existence? A. It was formed in 1929.

Q. What assets did it have when it commenced business?

A. It acquired the capital stock of three of the Lerner companies that were then existing, the stock of which was owned by the individual Lerner. It acquired the capital stock of the individuals.

Q. Yes. Did that include the entire capital stock of the company known as Lerner Stores Corporation, which had been known as Lerner Blouse Corporation?

A. Yes, it did. There [31] were two corporations, one a New Jersey, and one a Delaware, known as the Lerner Store Corporation was acquired by the Lerner Stores, Maryland. Lerner Stores, Delaware, owned the stock of New Jersey.

Q. So that the present company, Lerner Stores Corporation, owns the stock of all the companies that have operated Lerner Stores and has acquired or has the stock of all companies that now operate Lerner Stores. A. Yes, that is true.

(Testimony of Graham Magee.)

Q. In connection with those acquisitions did it acquire the right to use the name "Lerner"?

A. Yes, it did.

Q. Can you tell us by what name the plaintiff's business and the business of its subsidiaries is known?

A. The trade name is known as "Lerner Shops."

Q. By trade name, you mean what?

A. The sign on the entrance to our store and on our windows and on our boxes.

Q. Yes; and by what name is it referred to by the persons doing business with the company?

A. Referred to as "Lerner's".

Q. Have you personally had experience to that effect? A. Yes, I have.

Q. Who is the person who is active in taking and acquiring leasehold interests for the company, real property for the company? A. I do.

Q. In that connection, do you have to travel through the country?

A. I travel all over the United States.

Q. How frequently do you travel?

A. I spend six months a year [32] on the road.

Q. In that six months' period do you contact people on behalf of the plaintiff and its subsidiaries? A. Yes, I do.

Q. And in those contacts what is the name by which you and the people you do business with refer to the company and its subsidiaries?

A. We always talk of "Lerner's."

(Testimony of Graham Magee.)

Q. Can you tell us very briefly the history of an establishment of these stores, as to when they started, and how they spread—just in a few words?

A. In 1919 there were six retail stores opened, and thereafter they opened a few a year. I would say that in 1920 they opened five stores; in 1922 they opened one store; in 1923 they opened four stores; in 1924 they opened twelve stores; in 1925 they opened nine stores; in 1926, fourteen stores; in 1927, twenty stores; 1928, twenty-seven stores; 1929, thirty-five stores. And it has continually grown since that time.

Q. There are how many stores now?

A. 181 stores.

Q. In how many States?

A. Forty-one States.

Q. You are an executive officer of the company?

A. Yes.

Q. And a member of the so-called management group of officers?

A. Yes, sir.

Q. And have been for a number of years?

A. That is correct.

Q. Can you tell us whether or not it is the policy of the company, speaking of it as an executive, to continue to open new stores?

A. Yes, it is the policy. [33]

Q. What determines the place where the company will open new stores?

Mr. Robinson: This is, of course, subject to the same objection, your Honor, and I assume your Honor will make the same ruling.

The Court: Very well.

A. Using San Francisco as an illustration, we first opened in San Francisco to establish business here, and eventually opened in the surrounding areas to San Francisco. We did likewise in Los Angeles, and that is true of the other large cities.

Mr. Goldberg: Q. Is there some definite merchandising policy that is involved in that practice?

A. The reason you get into that practice is the matter of supervision of the stores. We have a district supervisor, and the district manager who supervises eight or ten States, and we group the stores for the purpose of economy in supervision.

Q. When you go into an area where you would have a store, where would you place your first store or stores?

A. We, of course, try to locate a business city where we know we will do a good business.

Q. With respect to the area surrounding that city, did you make any study to determine whether or not you are going to get any business from the surrounding area?

A. No; going into a city we first attempt to determine the amount of volume we can expect in that city; and in determining that volume you have to [34] know its trade area.

Q. What is the necessity for determining volume based on?

A. You have to determine volume in order to know what rent you can afford to pay.

Q. Then, in determining volume, what sort of study do you make?

(Testimony of Graham Magee.)

A. We take into consideration the trade area, the distances in the city, and its trade area, the bank deposits, and the other merchants that are presently located in the city.

Q. Did you participate in the original lease on Lerner Stores of this company in San Francisco?

A. Yes, I did.

Q. At that time what trading area did you take into consideration?

A. We took in the entire bay area as a trading area for San Francisco. I would say anywhere—we included in a trading area the city of a size of San Francisco, cities located within fifteen, twenty, thirty or forty, fifty or sixty miles from San Francisco, depending upon the ability of the shoppers and their means of transportation to get into a city of this size.

Q. Did you make any study as to the transportation facilities in the area into San Francisco?

A. Yes, we did.

Q. For instance, between San Francisco and San Jose, and the communities between San Francisco and San Jose, what did you determine there were, as to facilities?

A. As an illustration, they have what is known as a "Shoppers Train" that runs between San Francisco and San Jose, and that is true of most of these communities surrounding San Francisco.

Q. When you say a "Shoppers Train," what do you mean?

A. It is a train that leaves in the morning and

(Testimony of Graham Magee.)

a similar train that returns that afternoon to San Jose.

Q. Did you make any study as to whether or not it was patronized by women, for instance, who came in to town——

A. We determine the circulation of the newspapers, because that determines your buying public. After all, the buyer of a newspaper is a potential purchaser of merchandise in our store, and you determine where those newspapers are sold. In all of the cities within thirty, or forty, or fifty, or sixty miles of San Francisco, they read the morning and evening San Francisco papers, and that determines the fact that they are customers, because the department stores in San Francisco advertise for the purpose of bringing this type of customer to San Francisco. They become our potential customers.

Q. Do you know whether the San Francisco papers are sold on the streets in San Jose?

A. Yes, they are—newsstands.

Q. And with respect to your San Francisco stores, one is located next to the Emporium and one is located next to the White House.

A. That's right; they are large advertisers and being in close proximity to those stores it enables us to obtain potential customers.

Q. Your stores do a cash business, do they not?

A. Yes, entirely.

Q. So you don't have charge accounts or names of customers as —— [36]

(Testimony of Graham Magee.)

A. No. The only way we would is if they had a credit slip, or a return slip.

Q. When you get a credit slip or a return slip from a customer, that slip carries the name and address of the customer?

A. Yes, and the copy goes to the New York office.

Q. And those copies that go to the New York office come to your attention, do they?

A. No, they go to the bookkeeping department. I have had occasion to see them from time to time.

Q. From those slips you can determine——

A. From those slips you can determine your trading area for your store. You can determine where your customers are coming from. It also enables us to determine in opening new stores whether or not we have a nucleus for a new proposed store.

Q. When did you first do any work on the lease for San Jose?

A. We started negotiations for that in 1941.

Q. At that time when you started those negotiations, did you determine whether or not you had a nucleus in San Jose?

A. Yes, we had been in business on Market Street in our large store since 1935, and we had built up a very substantial volume. The records that we would have there in the form of credit slips would indicate we had a great many customers in San Jose, and also other surrounding communities of San Francisco.

(Testimony of Graham Magee.)

Q. Is this practice that you testified to in opening in a large area, and then opening in the subsidiary areas, if you build up a nucleus there, is that a practice that is followed by other [37] chain store organizations? A. Yes, it is.

Q. And with regard to San Jose, have any other chain stores organizations opened there?

A. Oh, yes.

Q. What ones?

A. The variety stores are there, including J. C. Penney. Some of your local department stores, such as Hale's, have gone into that type of community. The shoe chains, such as Edison, have gone into San Jose—Zukor and Grayson, too.

Q. What line of business are the last two in?

A. Zukor and Grayson are in the same line of business we are.

Q. In that San Francisco store, or, rather, on the outside of it do you have a sign?

A. We have a sign, "Lerner Shops."

Q. How large is it?

A. It is a pretty large sign, because of the frontage. I would judge the sign must extend over an area of twenty feet. The letters, I should say, are three to four feet in size. They are lighted.

Q. They are lighted at night?

A. Yes, when permitted.

Q. Is that a sign visible to people in that vicinity?

A. It is visible for quite a distance on Market Street.

(Testimony of Graham Magee.)

Q. With respect to the way in which your company is known to the public, do you receive mail in your office in New York addressed to the company?

A. Yes, it is received and in a great many ways.

Q. How is it addressed?

A. It is addressed in a great many ways. A great many people address us as "Lerner Stores," "Lerner's," [38] "Lerner Bros."

Q. Do any address you as "Lerner Stores Corporation"?

A. I would say most of the business mail is addressed as "Lerner Stores Corporation," because that is our corporate name.

Q. Is there any other firm or business in this state, to you knowledge, engaged in ladies' wearing apparel business which does business under the name "Lerner's," or any part of the name, other than the defendant?

A. None that I know of, or ever heard of.

Q. What is the situation with respect to the West Coast States?

A. There are no stores on the West Coast by that name other than the defendant.

Q. With respect to size, how does the Lerner group of stores compare with those in the same line of business?

A. We did last year approximately eighty-seven million; and our nearest competitor would do approximately twenty million.

Q. Is that in this country?

(Testimony of Graham Magee.)

A. It is in this country; the nearest in England is twenty-three million.

Mr. Robinson: Q. Do you have stores in England?

A. No, I said the nearest competitor of ours in England would do twenty-three million.

Mr. Goldberg: Q. Your fiscal year ended January 31, 1945? A. That is correct.

Q. With respect to the lease in San Jose, without going into details can you tell us when the term commenced, and for what [39] period of time it is?

A. The lease was made for a term commencing July 1, 1942, and it extends for twenty years and eleven months.

Q. And where is the property covered by the lease?

A. It is located between Montgomery Ward and W. T. Grant.

Q. On what street?

A. On the main street. I don't recall the name there.

Q. Is that the same street on which the defendant has his store? A. Yes.

Q. Where is it with respect to defendant's store?

A. He is in the block down below us.

Q. Is it on the same side of the street?

A. It is on the same side of the street.

Q. What is the size of the property you have leased?

A. We have leased a store 35x137.

(Testimony of Graham Magee.)

Q. Why haven't you already occupied it?

A. Under the provisions of the lease we agreed to build a new building, and at the time of occupancy, proposed occupancy, under the lease there was a restriction, L-41, which prohibited an expenditure in excess of \$5000 for reconstruction.

Q. L-41 is a regulation of the War Production Board?

A. Yes.

Q. What have you done with the property?

A. We have continued the tenants. Moss Stores was there, and we continued them in occupancy. We had a vacancy in the other store and we were obligated to get a temporary tenant to occupy it.

Q. What is your rent obligation under that lease?

A. Part of the term \$100 a month; balance of the term \$1000 a month, against percentage on sales.

Q. Do you have any obligation under that lease to occupy the premises, yourself, or can you sublet it to others?

A. We have to occupy the major part of the premises, but we can sublet a small store, a ten-foot store.

Mr. Robinson: We object to that as calling for the opinion and conclusion of the witness, particularly under the present circumstances. It is a conclusion of law.

The Court: It hasn't anything to do with this

(Testimony of Graham Magee.)

case. I don't want to try that lease. You are not occupying that now?

A. No.

Q. As a matter of curiosity, how do you get by with that?

A. They can't do anything else, since the law won't permit us to build.

Q. You mean if they try to throw you out, you would say there is an impossibility of performance?

A. That's right.

Mr. Goldberg: I am trying to shorten this matter. I have a twenty-seven page lease, here, which I am hesitating to offer.

The Court: I think you have covered all you want in that connection, haven't you?

Mr. Goldberg: But there is a provision in which the parties state the tenant cannot occupy the premises in its present condition. So the landlord, himself, recognized they couldn't [41] occupy the premises without reconstruction.

The Court: Then you are not bound to occupy them until the situation is changed so they may proceed to reconstruct, so as to occupy?

Mr. Robinson: And there is nothing in the lease that they have to open up under the name of "Lerner's" or "Lerner Shops."

Mr. Goldberg: I believe there is, and I will show that to you. I want to read a portion of it. It is not long, the part I have in mind, and we can draw our own conclusions as to what it means. I am reading from page 25 of the lease:

(Testimony of Graham Magee.)

“Lessee covenants and agrees that during the entire term of this lease it will operate and conduct its business in the portion of the demised premises other than the portion which Lessee may sublet pursuant to the provisions hereinabove contained, in accordance with the usual standards and practices of Lessee, employed in Lessee’s other stores now being operated in the State of California, and that during the entire term hereof it will maintain and keep on the demised premises, for sale, a full and complete line of seasonable merchandise in conformity with its merchandising policies for this section of the State of California.”

Q. I might ask Mr. Magee whether the portion of that which I have just read is from the original lease?

Mr. Robinson: Mr. Goldberg, I accept your statement. [42]

The Court: You need not bother with that.

Mr. Robinson: I don’t mean by that that I am conceding the materiality of that.

The Court: I understand that.

Mr. Goldberg: Q. Mr. Magee, you referred to a new lease of your premises on Market Street in San Francisco, by which you took the entire building, and where your store is located?

A. That’s right.

Q. When was that made?

A. That was completed this last summer, and we had been negotiating on it for some time.

Q. Do you recall with respect to the date of

(Testimony of Graham Magee.)

June 1, 1944, whether you completed your lease before or after that date?

A. I would say it was around that time.

Q. Were you here in California at the time?

A. I was here in California at the time, yes.

Q. At the time that was done had you heard of the opening of this store by the defendant in San Jose?

A. No, I had not.

Q. Under the terms of that lease what was your obligation with respect of occupying the ground floor?

A. We were obligated to occupy the entire 80 feet.

Q. You have testified to having taken leases, or purchased property in various localities in California. Is it the practice of the company to take leases or purchase property for purposes other than to occupy them, itself?

A. No, it is not. [43]

Q. What is the plan of the company with respect to occupying one of its stores, that is, in connection with the leases and property you referred to?

A. The practice, as soon as we take a lease, as soon as we can get possession, make the improvements and go into business and operate our regular type store.

Q. With respect to the type of lettering that is used in Lerner Stores throughout the stores, can you tell us what the practice of the company is?

A. The type of lettering has changed over a period of years. The original lettering was a script lettering. Then we changed to a block let-

(Testimony of Graham Magee.)

tering; and in 1929 we went to a modernistic type of lettering; and the last four or five years we have been using a script letter.

Mr. Robinson: May I suggest you give the locations where those things were and are in use?

Mr. Goldberg: Yes. I think in order, perhaps, to refresh the witness's recollection I would like to show him some photographs.

Mr. Robinson: You can speed it up any way you think advisable, Mr. Goldberg, and I will give you every co-operation. I haven't seen them before.

Mr. Goldberg: Q. Can you tell us, Mr. Magee, first, with reference to your stores in California, whether you have any stores in California where the name "Lerner Shops" is now in script letters?

A. Yes, we have a number of stores. [44]

Q. Can you tell us?

A. We have Huntington Park; we have Fresno, San Jose, Stockton——

Q. Are those stores in California that you mentioned newer stores, that is, recent stores?

A. We opened Huntington Park——

The Court: Let's not go over that again. How about stores around here in this bay area that you spoke of?

Mr. Goldberg: Q. The signs on the stores in San Francisco and in Oakland are in block lettering?

A. That is correct.

The Court: Q. Have you any photographs of those?

A. We have San Francisco.

(Testimony of Graham Magee.)

Mr. Goldberg: We have a picture.

The Court: You might put that in the record.

Mr. Goldberg: That is part of the annual report containing a number of stores and one of the other San Francisco stores has block lettering.

The Court: Have you seen this, Mr. Robinson?

Mr. Robinson: I believe I saw it at the pre-trial conferences. We can do better than that for you. I didn't see this particular picture.

The Court: You mean you have a photograph of the San Francisco store?

Mr. Robinson: Yes, I think we had one here at the pre-trial conference.

The Court: Maybe counsel can agree that is a photograph and either side may use it then. [45]

Mr. Robinson: Q. Is this the same one, Mr. Goldberg?

Mr. Goldberg: Q. Mr. Magee, is this a picture of the front of the San Francisco store on Market Street? A. Yes, it is.

Q. I notice there are two types of lettering, one above the entrance and one immediately below that.

A. That is new lettering. The lettering on top was possibly placed there after the lettering—above the awning. It is block letter above the sign, and it is a small of—the name for the type lettering I don't just recall.

Mr. Goldberg: Shall I offer this?

Mr. Robinson: You may use it if you wish, Mr. Goldberg.

(Testimony of Graham Magee.)

Mr. Goldberg: I would like to offer this in evidence. This has two types of lettering.

The Court: That is the Market Street store, Mr. Goldberg?

Mr. Goldberg: Yes, your Honor.

The Court: Very well.

(Photograph was marked Plaintiff's Exhibit 1.)

Mr. Goldberg: At the same time I would like to offer in evidence in connection with the testimony just given the photographs of the fronts of other stores in California having script lettering on the signs as follows:

Mr. Robinson: Just a moment, Mr. Goldberg. By my silence I don't want to put myself in the position of having to remember something important, especially when we are going to have a recess. The pictures speak for themselves, and both [46] you and the witness refer to the lettering as script; and I do not agree with you it is script; but there is no use of you and Mr. Magee getting into a controversy over what the lettering is. The court can determine whether it is the same script as ours, or what.

Mr. Goldberg: It is not block lettering.

The Court: Suppose we take a recess at this time, and why don't you get the pictures arranged with Mr. Goldberg without any further ado during the recess. If you have a picture of the Oakland store, or the San Francisco store, I would like to

(Testimony of Graham Magee.)

have those, as well as the ones in other parts of California.

Mr. Robinson: We have Grant Avenue. We do not have Oakland, and we don't know anything about the stores in any other parts of the state.

Mr. Goldberg: We didn't take a picture of Oakland, not believing it was material, but we have no objection to any counsel has.

Mr. Robinson: We haven't any. But I don't know what kind of lettering you have over there, Mr. Goldberg.

The Witness: I would say it is block lettering.

Mr. Robinson: Q. Somewhat the same as Grant Avenue, San Francisco?

A. I would say about the same as Grant Avenue.

Mr. Robinson: I have Grant Avenue that we can use as [47] Grant Avenue and quasi Oakland.

The Court: Is that agreeable to you?

Mr. Goldberg: We are happy to offer it and stipulate that the sign on the outside of the Oakland store is in block letters, and I don't know if it is sufficiently similar to call it quasi Oakland.

The Court: That picture is Grant Avenue, San Francisco, the next exhibit.

(Photograph marked Plaintiff's Exhibit 2.)

Mr. Goldberg: Can't we mark all of them now?

Mr. Robinson: Might this be done during the recess?

The Court: Have you anything to identify the city?

Mr. Goldberg: Yes, every one has an identifica-

(Testimony of Graham Magee.)

tion on the front except one, and that has it on the back. All of them will be offered with the identification on front or in the back.

The Court: All of them are now being offered?

Mr. Goldberg: Yes. San Diego will be Exhibit 3.

(Photograph marked Plaintiff's Exhibit 3.)

Mr. Goldberg: Huntington Park will be No. 4.

(Photograph marked Plaintiff's Exhibit 4.)

Mr. Goldberg: Fresno will be No. 5.

(Photograph marked Plaintiff's Exhibit 5.)

Mr. Goldberg: Stockton will be No. 6.

(Photograph marked Plaintiff's Exhibit 6.)

Mr. Robinson: It is going in subject to our objection that they are all immaterial, and obviously because they are remote; and on the further ground they do not show script.

The Court: I think your objection goes to the weight of the testimony. I will overrule the objection.

The Court: We will recess until two o'clock this afternoon.

(A recess was taken until 2:00 o'clock p.m.)

Afternoon Session, April 26, 1945, 2:00 p.m.

The Court: Go ahead, Mr. Goldberg.

GRAHAM MAGEE,

recalled.

Direct Examination (Resumed)

Mr. Goldberg: Q. Mr. Magee, you have referred to the Grant Avenue store and the Oakland store: Can you tell us what the frontage is of the Grant Avenue Store?

A. Approximately twenty feet.

Q. What is the frontage of the Oakland store?

A. Approximately eighteen feet.

Mr. Robinson: Pardon, I didn't hear the Grant Avenue figure.

Mr. Goldberg: Twenty feet, and the Oakland store has eighteen feet.

Q. Mr. Magee, does the plaintiff have its shares of stock listed on an exchange?

A. Yes, the New York Stock Exchange.

Q. What shares are those?

A. The common shares.

Q. Do you know how many shares are outstanding?

A. We have now twelve hundred thousand shares.

Q. About how many stockholders of common stock do you have?

A. Twelve to fifteen hundred stockholders.

Q. You also have a preferred stock outstanding?

(Testimony of Graham Magee.)

A. We have a preferred stock outstanding, traded over the counter. [50]

Q. 32,000 shares?

A. Approximately 32,000 shares.

Q. Of a par value of \$100 each?

A. That's right.

Q. Has the plaintiff company placed a value on its books on its name or good will?

A. No, it hasn't.

Q. Does it have a value?

A. It has a substantial value.

Q. What would you say is its value?

A. I would say many millions of dollars.

Q. One question I forgot to ask you before; maybe the court takes judicial knowledge of this—I am not certain—but San Jose is on a main traveled highway, is it?

A. It is on a direct route south to Los Angeles.

Q. Pardon me?

A. Also on the northern route to San Francisco.

Q. And beyond San Francisco?

A. To the other cities—Portland and Seattle.

Q. And the store of the defendant, as well as the store which you have leased, are on the main street?

A. That's right; you would pass the store if you were going either north or south.

Q. Do the Lerner Stores of the plaintiff in various localities obtain any substantial amount of business from customers who have done business in other Lerner Stores?

(Testimony of Graham Magee.)

A. Yes, they do, and that is the nucleus of our business.

Q. Can you tell us whether the plaintiff in this case—let me withdraw that. In connection with that lease that we had here that we referred to this morning in San Jose, that lease runs to Lerner Shops of California, Incorporated, does it not? [51]

A. As the tenant. The lease is guaranteed by the plaintiff.

Q. The plaintiff in this action is guaranteeing the performance of the lease by the subsidiary company?

A. That's right; that is our standard practice.

Q. Can you tell us whether the plaintiff in this action has been damaged by the opening of the defendant's store in San Jose under the name "Lerner's"? A. Yes.

Q. In what way has it been damaged?

A. It has been damaged—customers who have traded in the store think they are trading in the Lerner Shops.

Mr. Robinson: Just a minute. Does the witness understand he is to give his own knowledge, or opinion?

The Court: Do you object to the question?

Mr. Robinson: I object to the question as incompetent, irrelevant, and immaterial, and calling for the opinion and conclusion of the witness.

The Court: I think the question as to whether they have been damaged is for the court to determine.

(Testimony of Graham Magee.)

Mr. Goldberg: That question was answered. The next question was how it was damaged, and that is a question of fact, at least what happened that did damage the plaintiff.

The Court: I don't think that would help the court to have the witness state if they were damaged.

Mr. Goldberg: That is what we were coming to. That was preliminary. That was answered without objection, but the objection [52] seems to be to the second question: How was the plaintiff damaged?

The Court: I think the question is objectionable and I will sustain the objection. You can ask him if he can give any facts with respect to the opening of this store.

Mr. Goldberg: I am asking him this:

Q. In what way, if any, has the plaintiff been affected by the opening of defendant's store in San Jose?

A. The customers have bought merchandise in defendant's store.

Q. Whose customers?

A. The Lerner of San Francisco customers have bought merchandise in defendant's store, and in visiting the plaintiff's store, asked, wasn't that our store in San Jose, that they bought merchandise in there. It wasn't up to the same quality of merchandise that they bought in the Lerner Store in San Francisco.

Mr. Robinson: Just a minute. Are you finished? I move to strike the answer on the ground the witness is obviously giving his conclusion and not stat-

(Testimony of Graham Magee.)

ing the facts. If he is prepared to say he knows things of his own knowledge, then he is responding to the question as indicated by the court. The witness is stating a general conclusion.

The Court: Where did you get the information upon which you based your last answer?

A. The customers who come in the store.

Q. I mean, where did you get the information?

A. While I was in [53] the store. I visit these stores quite frequently.

The Court: What some customer told you?

A. The sales girl called my attention to it while I was there.

Mr. Goldberg: I am prepared to show, your Honor, that that is not hearsay, that proof of confusion in this type of thing is not hearsay, but, if anything, is considered an exception to the hearsay rule, and as courts have said, is the only way in which that type of thing can be proved, is by the customer's reactions.

The Court: The salesgirl might testify to that. But what the salesgirl told the witness would not be an exception to the hearsay rule.

Mr. Goldberg: I intend to have the sales people here to testify to that, and I am perfectly willing that that testimony be permitted subject to a motion to strike it out if it is not testified to by the sales people, because this is only——

The Court: I will say to you, Mr. Goldberg, that I won't pay very much attention to that kind of testimony.

(Testimony of Graham Magee.)

Mr. Goldberg: What is that, your Honor?

The Court: The testimony that somebody says a person came into the store and made that statement. There is no way for the other side to cross-examine on that type of testimony.

Mr. Goldberg: We are satisfied as a matter of law the courts recognize that is the only way a complaining party could prove that sort of fact. [54]

The Court: I have tried other cases of this type in which the parties themselves have been brought into the court to testify, so there would be an opportunity to cross-examine them. If that is the essential part of the case, the resources of the company should be such that they can bring in those people. You can produce that evidence, but I wouldn't be prepared to make a finding on such evidence as that.

Mr. Goldberg: It is not hearsay. It is admissible evidence.

The Court: Let me ask you: If you were a judge, would you issue an injunction solely on the testimony of the plaintiff, himself, who says that someone told him that he came there by mistake, without more direct evidence?

Mr. Goldberg: I would say this: If I had three stores in this San Francisco Bay area and several of the people working for me in each of those stores came in and testified in court that they have customers, people they know who are from San Jose, although they don't know them by name, but they come in and tell them that they bought something

(Testimony of Graham Magee.)

in our San Jose store and were told that we do not have a store in San Jose, and these people insist we did have a store in San Jose because of the name. I think that is permissible, and it is persuasive, especially if it has happened on a number of occasions. I think it places on the plaintiff an impossible burden, to say we should be in a position to produce those people to testify on matters which have occurred in various stores, and weren't called to our [55] attention, that is, to the attention of the proprietor, you might say, or the management, until a long time afterward, because the sales people didn't believe, or pay enough attention to it. Some of them didn't even know. Some of them thought we did have a store in San Jose when they were questioned about it. So it seems to me the plaintiff is producing about the only kind of testimony in the ordinary course he could get on the subject; and if he produced more than one isolated occasion, it has weight. It isn't the only testimony we have. We have in the record proof of the fact we have San Jose customers.

The Court: Of course, the question we have is that you are now asking the witness on the stand to tell you what his sales girl told him, and I think that is far-fetched.

Mr. Goldberg: I don't have in mind we are proving the fact by his testimony; but we are proving the damage suffered by the plaintiff based upon those facts, which cannot be disregarded.

(Testimony of Graham Magee.)

Mr. Robinson: It is not the pending question. I might say——

The Court: The question to which our attention has been directed is a question that apparently calls for some statement to this witness by some sales people.

Mr. Goldberg: I think the pending motion is to strike the answer as a conclusion, and counsel called it a conclusion, because it is claimed it is based on hearsay. I don't think it [56] is a conclusion at all, if the fact is admitted, and the fact, I am satisfied, is admissible, even though we might have to take this witness off the stand and put the sales people on and put him back.

The Court: I don't know why you ask this witness about that.

Mr. Goldberg: I didn't make myself clear. I didn't ask him if he lost customers. I am asking him what is the effect on the plaintiff's business of the opening of the store by the defendant in San Jose, and he is giving his answer.

The Court: I am sorry to say, I don't need a witness to tell me that. If the facts show me that to be the case, that is a conclusion I could draw.

Mr. Goldberg: Our point is simply this——

The Court: I want to save time. Let him answer. I have already indicated how much weight the court will attach to that.

Mr. Goldberg: I think we are putting the emphasis on something different. I am not trying to prove by this witness the fact that we lost business,

(Testimony of Graham Magee.)

because I can prove that by the people who had the direct contacts; but assuming that because he was taking that as a basis for his answer, the question is in order; was the company affected by it? My point is this, that in this witness' testimony it is shown that we are not affected merely by the loss of the particular sales, but by the fact that customers of ours who are accustomed to doing business with us [57] and getting our type of merchandise, with our policy and treatment have done business in another place having a different policy, thinking it was ours; somewhat different merchandise, as far as styles go, and at a somewhat higher price for what we say is comparable merchandise. Therefore, our reputation and our good will have been damaged with respect to those customers, and perhaps with respect to many others from whom we haven't heard.

The Court: I can understand that, and I thoroughly appreciate the point you are making; but the witness' conclusion as to that is no more different than any conclusion the court might draw. You must present facts as to the nature of the business that these defendants did.

Mr. Goldberg: True.

The Court: And then the comparison will follow from that. If you are able to show that some customers were misled by that, all right, but I don't think that the witness' conclusion proves anything. You have to have some facts upon which to base that. I understand what you are driving at. It is

(Testimony of Graham Magee.)

very clear, but I don't think it proves anything for us to ask the secretary of the company to draw a conclusion that is very obvious. You must have facts rather than just a statement of the officer of the company.

Mr. Goldberg: I think this——

The Court: Yes. [58]

Mr. Goldberg: Aside from the conclusions which would follow obviously, which are that you have lost business if somebody has bought from someone else the vale of the name of the company and its method of doing business is perhaps a little more emphasized in the case of the plaintiff than might be usual, because it has built up its business on its name and its method of doing business. Therefore, anything that happens, that makes people doubt the value of it is more detrimental to this company than a company who hasn't had that policy. That is what I am concerned with this witness, who has been with the company for years.

The Court: Go ahead with the examination if there are some factual matters you want to bring out. What you have just stated is more in the nature of argument.

Mr. Goldberg: What I stated is, your Honor.

Q. You testified this morning that customers who buy in one of the Lerner Stores have the privilege of exchanging that merchandise in any other store in the country that Lerner has. Is that a practice that is taken advantage of by customers?

A. They do it quite often, because many times a

(Testimony of Graham Magee.)

customer might be in Santa Barbara, buy merchandise in Santa Barbara, and when she gets back to her home in one of the other cities she wants to exchange it, because she had the wrong size, or didn't have the right color. As a matter of fact, it is quite prevalent throughout our stores throughout the country. That is the reason we made it a policy. [59]

The Court: If that is the case, Mr. Goldberg, then if somebody dealt with this store in San Jose, thinking it was your store, then it would be true, would it not, that no one practically any place in the United States reasonably close to any community in which you state you have a store, could have a store under the name of "Lerner's?"

A. Where the confusion arises——

The Court: Wouldn't that be so?

A. A customer buys a dress in the Lerner Shops and goes into San Jose and sees a shop by the name of "Lerner's", and she thinks she is dealing with the Lerner Company.

The Court: That would be true of any town in the United States where there were a number of communities a few miles apart.

A. That is the reason we are——

The Court: You have answered my question.

Mr. Goldberg: Q. Does the plaintiff or its various subsidiaries advertise their business?

A. They don't advertise it in the newspapers, but they do in other forms.

Q. In what other forms?

(Testimony of Graham Magee.)

A. We consider these types of stores we erect in these communities advertising. We consider the way we display our merchandise, our backgrounds in the windows, as advertising.

Mr. Robinson: I move to strike that. It is obviously all the same tenor. I think the witness ought to answer Mr. Goldberg's question, do you or do you not advertise, and tell us [60] what they do. He is testifying to what he considers advertising. It is for the Court to decide whether a certain type of store is advertising.

A. We do advertise in the following forms: We spend an average of \$10,000 for the erection of a store front which is to a great extent a sign. We call it a billboard sign, indicating the location of the Lerner Shops. We expend a considerable amount of money for the window background and the fixtures in these windows, and display the merchandise in the windows. All merchandise in the windows is ticketed with the name "Lerner Shops," and with the price, which isn't the customary practice in a great many stores. We spend considerable money in the lay-out of the store, which is advertising.

Mr. Robinson: I move to strike the last part of the answer beginning with "We spend considerable money."

The Court: That may go out.

Mr. Goldberg: The part which is advertising.

Q. About how many transactions did you have

(Testimony of Graham Magee.)

last year, sales to the public, that is, your fiscal year?

A. Approximately thirty million individual sales.

Mr. Robinson: Mr. Goldberg, are you bringing in the nation-wide figures, also, to show we are damaging your New York, Chicago and New Orleans stores? From your position here, I don't know the limits embraced, if there are any limits.

Mr. Goldberg: We have one name and one good will, and if [61] you have damaged it you damaged it wherever it is and whatever it is. We do business all over the country, and those people can be doing business with us in San Francisco or San Jose even though they live in New York.

The Court: Gentlemen, can't we move a little faster? I don't think there is any dispute between you that this is a big firm and does a large business. Can't we get down to the specific matters that give rise to the litigation?

Mr. Goldberg: I have to prove that by the defendant, himself, which I propose to do, but I want first to prove our case. It is not denied; in fact, it is claimed that the defendant opened the store and engages in the sale of women's wearing apparel in San Jose. We start with that foundation. The particulars will be developed from photographs and from Mr. Wilfred Lerner's own testimony.

The Court: All I am suggesting, Mr. Goldberg, is that I think it has been sufficiently developed

(Testimony of Graham Magee.)

from what you have brought out and by your opponent's statements that this is a very large concern and has a large number of stores in the kind of business it does. Unless you have some particular matter that you think should go in the record that has not been covered up, why can't we dispense with this line?

Mr. Goldberg: The purpose of these questions this afternoon is to direct the Court's attention to the fact that this company is damaged by the use of a name in the manner of the defendant, [62] not merely on a showing of how many sales it lost, but anything which might make the customers or prospective customers think they are buying Lerner's merchandise.

The Court: I understand your contentions exactly, but it seems to the court that it all comes down to what the defendant did that brought about any of these situations that you speak of that are damaging to your client. That is the whole question.

Mr. Goldberg: Oh, if the Court please, there is a certain amount of it that is not in dispute.

The Court: I thought we went over all this in the pretrial conference, although we didn't have a pre-trial order. It seems to me these facts the witness is testifying to are not disputable matters.

Mr. Robinson: We are not trying to put Lerner's out of business, and we are not claiming we have the right to put them out of business. They have certain rights and we have certain rights.

(Testimony of Graham Magee.)

The Court: Let us get on. I can see there can be no limit as to the field of inquiry as to the way the plaintiff conducts its business.

Mr. Goldberg: The plaintiff has the burden of proof, and what the defendant may have in his mind isn't going to assist the plaintiff to establish its case. The defendant has not assisted in his answer. He wouldn't even admit the plaintiff [63] was a Delaware corporation, or anything. We have to make certain proofs that haven't been admitted in the answer.

The Court: Weren't there stipulations made at the pretrial conference?

Mr. Goldberg: We have a transcript of it, but there are no stipulations.

Mr. Robinson: The allegation that the plaintiff is a Delaware corporation, to my recollection, is not denied.

Mr. Goldberg: Maryland.

Mr. Robinson: It is denied that the plaintiff has been continuously in business for twenty-eight years as alleged in the complaint, and it is denied that it is entitled to this name for various other reasons which are elaborated in the answer. I won't go into that now, but I don't want the court to understand we were captious and denied the plaintiff's corporate existence.

The Court: We are going far afield. Make your proof and go ahead.

(Testimony of Graham Magee.)

Mr. Goldberg: As far as this witness is concerned, I have proved that.

Mr. Robinson: Well, will Mr. Magee be here throughout the trial?

Mr. Goldberg: Yes.

Mr. Robinson: You are finished with Mr. Magee?

Mr. Goldberg: Yes. [64]

The Court: If you feel that you have other matters necessary to your case, bring them out.

Mr. Goldberg: No, your Honor.

The Court: I feel, as a matter of record, that we have made a record of these matters at the pre-trial conference.

Mr. Goldberg: I have read the transcript, and there was a good deal of discussion on both sides, but we never got down to stipulating to anything. There didn't seem to be much dispute about a lot of things, but they aren't part of the record as facts.

The Court: The reason I seem to be a little impatient with much of the details is that we have spent several hours on this matter, and it seemed to me the issue got down to the question of whether the designation of this defendant's store was sufficient to show that people were not misled, assuming that was your territory, as to whether those people were sufficiently misled to believe they were going in the plaintiff's store; and it seemed to me

(Testimony of Graham Magee.)

the purpose of the pre-trial conference was when we got to the trial we could get right at the issues.

Mr. Goldberg: Actually, it didn't get to that stage, because at the conclusion of the statements of facts back and forth it appeared there might be a means of adjusting this, and it was discussed, and it was wound up in that way and we didn't get to any stipulating as to facts.

The Court: All right, go ahead with the cross-examination. [65]

Mr. Robinson: Yes, your Honor.

Cross Examination

By Mr. Robinson:

Q. Do I understand, by going into the matters concerning which I made an objection and the objection was not sustained, I am not thereby waiving the original objection? I do not want to examine Mr. Magee on some things I don't think are material, but in view of the fact that they were gone into on direct examination I must go into that to clarify the situation.

Q. Mr. Magee, I understand the plaintiff corporation is a Maryland corporation? A. Yes.

Q. Incorporated in 1929? A. Yes, sir.

Q. And in 1929 did it take over the business of the predecessor corporations?

A. No, sir; it took over the capital stock.

Q. It took over the capital stock?

(Testimony of Graham Magee.)

A. Correct.

Q. What year was that? A. 1929.

Q. And the capital stock of what corporations?

A. Lerner Stores Corporation, Delaware corporation.

Q. That is, the Maryland corporation took over the stock of Lerner Stores Corporation, Delaware corporation?

A. Yes.

Q. How long had the Delaware corporation been in existence?

A. It was formed in 1920.

Q. It was formed in 1920? A. Yes.

Q. That was a chain store, is that right?

A. It was organized [66] for that purpose.

Q. Pardon me?

A. It was organized for that purpose.

Q. The Delaware corporation, the original Delaware corporation, which was organized in 1920, in turn took over the Lerner Blouse Company, is that right?

A. The first corporation—the series of events was, Lerner Waist Company, formed in 1907, which was in the manufacturing business. The assets of the Lerner Waist Company were taken over by the Lerner Blouse Company, a New Jersey corporation.

Q. When was that? A. 1919.

Q. The second Lerner Company was a manufacturing company, also?

A. That was retail. They had the right to manufacture, and as a matter of fact they did manufacture.

(Testimony of Graham Magee.)

Q. And then you got into the retail business under the name of Lerner Blouse Company?

A. Yes, they continued manufacturing and retailing at the same time—not manufacturing for the public. In 1920, the Lerner Stores Corporation, Delaware corporation, was formed, and it acquired the capital stock of New Jersey. They were both known as Lerner Blouse Corporation, and subsequently changed the name to Lerner Stores Corporation. You had two corporations.

Q. The original Lerner Blouse Company was the New Jersey corporation?

A. And the subsequent Lerner Blouse was the Delaware corporation.

Q. And in 1920 they took over the capital stock of Lerner Stores [67] of New Jersey. Now, what became of the Lerner Stores of New Jersey?

Mr. Goldberg: I think you are confused.

A. The Lerner Blouse Corporation was organized in 1919. In 1920 the Lerner Blouse of Delaware was organized; so you had two corporations. In 1925 both corporations changed their name from Lerner Blouse to Lerner Stores Corporation. The stock of the New Jersey, or Lerner Stores of New Jersey, was owned by Lerner Stores of Delaware. In 1929 the stock that was held by the individual Lerner and Mr. Lane in the Lerner of Delaware was purchased by Lerner Stores of Maryland and sold to the public.

Q. At that point you have three corporations;

(Testimony of Graham Magee.)

you have New Jersey, owned by Delaware, which is in turned owned by Maryland, is that right?

A. That's correct.

Q. Do those three corporations still exist?

A. No, sir.

Q. What happened to New Jersey?

A. New Jersey and Delaware both were discharged in bankruptcy.

Q. When? A. In 1932.

Q. Did New Jersey or Delaware do business in California? A. Delaware did.

Q. Delaware did in California, is that right?

A. That is correct.

Q. And the assets of Delaware were acquired by Lerner of Maryland? A. No, sir. [68]

Q. What happened to the assets of Delaware?

A. The assets of Delaware that were in the State of California were acquired by the Lerner Shops of California.

Q. I see. That is the point I wanted. In 1932 Lerner of Delaware, a subsidiary of Lerner of Maryland, was doing business in California?

A. That's right.

Q. That was the only Lerner doing business in California?

A. Lerner Stores of Maryland was qualified to do business.

Q. But the one actually doing business was——

A. The one actually doing business was Lerner's of Delaware.

(Testimony of Graham Magee.)

Q. Lerner's of Delaware in 1932 went into bankruptcy.

A. No, it sold its assets prior to bankruptcy.

Q. Are you sure of that?

A. Yes, sir; I handled it.

Q. It sold its assets to whom?

A. Lerner Stores of California, Delaware corporation, domesticated in the State of California.

Q. In 1932 Lerner of California was incorporated for that purpose? A. Correct.

Q. To take over the assets, the California assets of Lerner of Delaware? A. That's correct.

Q. And it did take over the assets?

A. That's right.

Q. At what value, do you recall?

A. They took over the assets, the book value on the inventory at book value, and they issued stock for the book value of furniture, fixtures, improvements and good will.

Q. And good will was down to one dollar?

A. That's right. [69]

Q. And good will, which you say is worth millions, you acquired at one dollar?

A. We have always listed good will at one dollar.

Q. Just prior to the time of Lerner Stores of Delaware going into bankruptcy, what corporate incident occurred that you recall?

A. I don't understand the question.

Mr. Goldberg: You can lead him.

(Testimony of Graham Magee.)

Mr. Robinson: Q. Lerner Stores, as such, never went into bankruptcy?

A. No, it sold its assets prior to that point.

Q. Let me refresh your recollection.

A. Yes.

Q. Do you remember being at 1060 Mills Tower in 1932 or 1933? A. I might remember.

Q. Do you remember the late Judge Marcel Cerf? A. Yes, sir.

Q. Do you remember telegrams you sent to our office telling us if we didn't let you off of your Sacramento lease you were going into bankruptcy?

A. We never did. The corporation never went into bankruptcy.

Q. Isn't it a fact that before going into bankruptcy, and for the purpose of concealing from the public that Lerner Stores of Delaware did business in California at that time, not in San Francisco, but in Sacramento——

A. That's right—no, that is not true, counsel, because the Lerner Stores of Maryland had the lease in Sacramento. Lerner of Delaware had no lease in the State of California.

Q. I understood you to say that it was Delaware that did business in California.

A. But it didn't have any lease in California.

Q. Well, you did business?

A. Delaware was operating the business, but it didn't have the lease in California.

Q. The Maryland was the leasehold corporation?

A. It was the parent corporation, and held the

(Testimony of Graham Magee.)

lease in the City of Sacramento, and it didn't go into bankruptcy.

Q. Maybe you can straighten me out on this, Mr. Magee: You were closer to the picture than I was. Isn't it a fact that before going into bankruptcy the name of the corporation which did go into bankruptcy was changed to the Realty Corporation of America?

A. Lerner Stores of Delaware changed its name to Outfitters Operating Realty Company, that is correct.

Q. And that is the corporation that had the lease, is it?

A. No, it didn't have the lease in the State of California. It held no leases in the State of California.

Q. That is the Delaware Corporation?

A. Yes.

Q. But it was the one operating in California?

A. All of the stores we were then operating in the State of California.

Q. You said when Lerner Stores of California took over the assets of Outfitters Operating Realty Company——

A. They took over the assets of Lerner Stores Corporation of Delaware.

Q. That's right. It did not take over the name. Naturally, that name went out of existence.

A. No, no, the sale of assets was made prior to bankruptcy.

Q. Was it made prior to the change of name?

(Testimony of Graham Magee.)

A. Yes. [71]

Q. Are you sure? A. Positive.

Q. You are also sure it never went into bankruptcy?

A. It never went into bankruptcy after it changed its name.

Mr. Goldberg: Q. You didn't say the Maryland corporation, did you?

A. The Maryland corporation had never been in bankruptcy.

The Court: This is all very interesting, gentlemen, but what has this to do with the case here? Why can't we move along?

Mr. Robinson: The point on this, your Honor, is the pleading states a continuous use of the name for twenty-eight years and we will show, and I think it is material——

The Court: Suppose it is only a few years; what difference does it make?

Mr. Goldberg: This doesn't tend to disprove it.

Mr. Robinson: Q. Mr. Magee, ever since 1932 the business in California has been conducted by Lerner Stores?

A. Lerner Shops of California.

Q. Lerner Shops of California, is that right?

A. That's correct.

Q. And that is a separate corporation?

A. That's right.

Q. With its capital stock——

A. All of it owned by Lerner Stores of Maryland.

(Testimony of Graham Magee.)

Q. Do you know who the plaintiff is in this case? A. Maryland.

Q. Lerner Stores of Maryland?

A. Lerner Stores of Maryland. [72]

Q. You maintain separate corporate entities, do you not, in all your transactions?

Mr. Goldberg: I didn't hear that.

The Court: Read the question.

(Question read.)

A. Yes, we do.

Mr. Robinson: Q. As a matter of fact, your San Jose lease is made with the California corporation, is that right?

A. And guaranteed by Lerner Stores Corporation.

Q. And guaranteed by Lerner Stores Corporation? A. Sure.

Q. Is that right? A. That is right.

Q. I understood you to say that in your various stores, including San Francisco, you sell the following items: coats, suits, millinery, bags, underwear, hosiery, dresses, and I believe you said furs?

A. Furs, fur coats, bags.

Q. You sell complete fur coats, or just fur-trimmed coats? A. Complete fur coats.

Q. Complete fur coats?

A. Complete fur coats, sportswear, slacks, sweaters—everything a woman wears, except shoes.

Q. Now, Mr. Magee, you heard the terms "Low end," "Popular priced," and "Specialty" used this morning, did you not? A. Yes, sir.

(Testimony of Graham Magee.)

Q. Do you consider your handle "Low end?"

A. No, sir.

Q. Is there anybody in San Francisco in your line, a similar shop, except in job lots, or things like that, that undersells you? [73]

A. Maybe Weinstein does.

Q. You don't know that, do you?

A. His type of business is what we call "Low end underselling."

Q. You don't know whether Weinstein, except for job lots or fire sales, undersells you?

A. There are very few companies in America underselling us.

Q. There are very few companies in America underselling you, is that right?

A. That's right; we sell the same merchandise they sell at a cheaper price than they sell it.

Q. You undersell department stores?

A. Yes, sir.

Q. And you undersell anybody else and you admit there may be a few exceptions, but in San Francisco you don't know how many?

A. The only one I know would be Weinstein. He operates on a lower market than we do.

Q. You don't know that to be the fact?

A. I don't know that to be the fact on some of his merchandise.

Q. Isn't it a fact that Weinstein sells slightly higher than you do, except when he has a fire sale or a clearance?

A. That isn't my understanding of his business.

(Testimony of Graham Magee.)

Q. That isn't your understanding of his business?

A. I have never seen his books; so I don't know what his mark-up is.

Q. You don't have charge accounts, either, do you?

A. No, sir.

Q. You have told us that you always locate in 100 per cent locations?

A. That is correct.

Q. How do you define a 100 per cent location?

A. You define it [74] as a location on which the heaviest pedestrian traffic circulates.

Q. And that is determined, is it not, by a traffic count?

A. No, observation.

Q. Isn't that one form of——

A. I never take a traffic count.

Q. In other words, whether you do——

A. No one for us takes a traffic count.

Q. How do you determine in your way what I would do by traffic count?

A. We study the streets, we study the community, we study the other businesses.

Q. And you determine the number of people passing the corner?

A. Yes.

Q. So you would do by ordinary observation what somebody else would do by traffic count?

A. A few people use the traffic count. The variety stores do; but as a general rule, it is not used.

Q. But we understand each other; by a 100 per cent location you mean a place where the greatest amount of pedestrian traffic passes?

A. On business sections.

(Testimony of Graham Magee.)

Q. On the block? A. On the block.

Q. In other words, the definition of 100 per cent location is that group of lots or locations or places of business in a city which commands the highest rent, and all other locations are graded from that, 90, 80 or 70 per cent?

A. That may be true; it all depends on the fellow who negotiates the lease, whether he pays higher or lower. [75]

Q. Of course, you also take into consideration the fact that you are near department stores and other large establishments that advertise and are responsible to some extent for that location being a 100 per cent location?

A. I would say we stay closer to variety stores than we do to department stores. In other words a department store might be on an 80 per cent location, but we depend upon, to a great extent, traffic on the variety stores.

Q. I understood you to say this morning that you choose locations near department stores because the department stores advertise in newspapers and brought trade in, and that trade therefore is attracted and becomes your potential customers.

A. They come down town, or come from San Jose to San Francisco as a result of department store advertising, and when they get to San Francisco they see the Lerner shops and come in and buy.

Q. You, yourself, don't advertise in newspapers? A. We do not.

(Testimony of Graham Magee.)

Q. While we are on the subject of advertising, you said the only kind of advertising you did was to build store fronts.

A. That is our form of advertising.

Q. There is only a general uniformity in your store fronts, isn't there—or there is no uniformity, is there?

A. The style of architecture changes over a period of years, so we have to take our stores as a whole. You will find in various periods of our history the type of architecture on the interior and outside front is different. You get modern ideas [76] and change your store fronts. We now have a pretty well standard front, but it may change in five years from now.

Q. But these pictures are current pictures (indicating)?

A. Well, the Stockton store was built a considerable time ago.

Q. This picture is dated October 15, 1943.

A. I know; but we opened a store about 1940.

Q. But they are pictures of current conditions?

A. They exist today.

Q. They exist today, and as of the day the defendant opened his store last June?

A. That is correct.

Q. What I meant by uniformity was you don't maintain uniformity in fronts, like Woolworth, that paints the front in red and with gilded letters, and they have identical fronts?

(Testimony of Graham Magee.)

A. Everyone pretty well knows the Lerner Shops.

Q. Answer my question.

A. We have a uniformity, yes.

Q. What does your uniformity consist of?

A. The type of lettering and color of the front.

Q. What is the color? A. Usually white.

Q. Your front is usually white?

A. White marble or white billboard signs.

Q. What color lettering do you use on your front? A. Lately we have been using red.

Q. The lettering is red? A. Yes.

Q. So, then, there is this uniformity to this extent, that you have a white background with red lettering? A. That's right. [77]

Q. And you have, usually, the word "Lerner Shops," is that right?

A. That's right; that is our trade name.

Q. The word "Lerner Shops" is not always on the same line, is it?

A. No, it depends upon the width of the store front.

Q. Sometimes it is like this (indicating)?

A. I would say 90 per cent of the time it is on one line.

Q. Sometimes it is in a heavy block letter like Market Street?

A. Our lettering in the last four or five years has been script.

Q. What you call script. This thing you said you

(Testimony of Graham Magee.)

didn't know exactly what it was; but it is not connected or written script like a man writes his name?

A. No, but this is a script lettering.

Mr. Goldberg: What store is that?

A. Stockton.

Mr. Robinson: Q. The Lerner Shop on Market Street is a heavy block sort of modernistic design? A. Not always.

Q. I say on Market Street.

A. On Market Street, yes.

Q. And Grant Avenue, the very same city of San Francisco, is considerably different. It has a light-bodied block, and there you have "Lerner Shops" on the same line with an underlining effect.

A. That is the thing that holds the lettering, that you see there, an awning box.

Q. When was Fresno opened?

A. It was opened about October of this year.

Mr. Robinson: Do you mind if I write under the word "Fresno" on the back of this picture, October, 1944, for future [78] reference?

Mr. Goldberg: That will be all right.

Mr. Robinson: Q. Of course, that was considerably after defendant opened his store in San Jose? A. That's right.

Q. And that has a special kind of lettering?

A. Script lettering.

Q. With a sort of attenuated "L" and an attenuated "S"?

A. It is due to physical conditions. It is script

(Testimony of Graham Magee.)

lettering, but it varies because of the physical condition. By that I mean, the façade of the building.

Q. But that long "S" and long "L" are not common to your other signs; you just use it on that one?

A. That's correct.

Q. There was room to use that same kind of lettering, if you so desired, in your San Diego Shop?

A. Architecturally, it wouldn't have lent itself to that.

Q. Your lettering and sign is determined by the architect of a particular building, and the space requirements and space available?

A. 99 per cent of our lettering is the same as San Diego.

Q. I am talking about California.

A. As I say, San Diego and these other stores that have opened in California——

Q. You didn't answer my question. I said the type of lettering is determined by the requirements of the architect and the store and the space available?

A. As a matter of fact, there was a different architecture used in Fresno than was used in the [79] other stores in California.

Q. And you left it to the architect?

A. Yes, that's right, that particular one. Ordinarily, we design the signs, ourselves, in New York.

Q. But you still didn't answer my question. The design is determined by the space available and the general style of architecture?

(Testimony of Graham Magee.)

A. I wouldn't say it was in this case; but that isn't true generally.

Q. It is a fact, is it not, Mr. Magee, that you could have, if you so desired, used the attenuated "L" and attenuated "S" in your San Diego job? There is all kinds of room.

A. San Diego was rebuilt in 1942 and the lettering used there is of standard script lettering. The lettering used in Fresno is not our standard script lettering.

Q. This is what you call script (indicating)?

A. That's right.

Q. I have shown you the San Diego photograph?

A. Yes.

Q. You say you used window background and fixtures. Do you use any particular unique type of window backgrounds? A. Yes, sir.

Q. In what respect is it unique?

A. It is unique in the respect that we designed ourselves this window background.

Q. What does it consist of?

A. It depends on the stores.

Q. Then it is different in every store, is that right?

A. It depends upon whether you are talking about stores recently built, or stores we built five years ago.

Q. Then it varies from store to store, and would it vary according [80] to the date it was built?

A. The style of architecture changes; the ideas of our interior designer changes.

(Testimony of Graham Magee.)

Q. When you say you spend the money on window background——

A. We spend \$2500 to \$3500 on window background.

Q. That will vary from store to store and from time to time in style and design?

A. As these architects get new ideas they vary it.

Q. It is not a particular design you have adopted for all of your stores, is it? A. No, sir.

Q. You say you have tickets in your windows?

A. Yes, sir.

Q. With the names on them? A. Yes, sir.

Q. By that you mean a little price tag with the words "Lerner Shops?"

A. Yes, sir; and we have a certain amount of display material in the windows with Lerner names on them.

Q. Can you point out to me anything in these window displays in these photographs that—I am referring now to pictures and background to identify it in the mind of anyone knowing your stores as being your particular layout or design?

A. These windows weren't designed by us. This store was designed——

The Court: Will you read the last question, Mr. Reporter?

(Question read.)

A. These photographs here would make it understandable that you can't see the window background in view of the photography; but we have used in the past window backing which became

(Testimony of Graham Magee.)

standard [81] and became known by the public as the window back used by Lerner. We used a type of wood which was uniform throughout the country.

Mr. Robinson: Q. Will you confine yourself for present purposes to California?

A. We used types of wood in California that were standard throughout the stores, that were built in that immediate period. I just don't recall the name of the wood, but it was unusual wood; the same as we do with fixtures.

Q. Where is that visible?

A. That is visible from the store windows.

Q. Where, on the floor?

A. We use a flooring not used by other stores of our type. We use a mahogany flooring.

Q. You use a mahogany flooring?

A. That's right.

Q. That is the sort of thing you refer to as unique things you do?

A. That is the way we spend money in advertising.

Q. That is the way you spend money in advertising, by building mahogany floors?

A. That is right.

Q. Do you know whether or not the defendant has a mahogany floor in his window? A. No.

Q. Did you make it your business to see whether it was infringing on you in that respect?

A. No, because he couldn't get mahogany when he built his store.

(Testimony of Graham Magee.)

Q. Well, was it important for you to check up?

A. It was important if we thought he had the same type of flooring.

Q. This mahogany was only common to your stores at a particular date, and later on you abandoned it?

A. We only abandoned it [82] because since the war you couldn't get it.

Q. What kind of flooring does the San Francisco Market Street store have? A. Mahogany.

Q. What kind of flooring does the Grant Avenue store have? A. It has mahogany.

Q. What kind of flooring does the Oakland store have? A. Mahogany.

Q. Is the fact that he has mahogany floor so distinctive that the public would associate it with a Lerner Shop?

A. I don't know. I think maybe it is the only one of the kind.

Q. I will show you a photograph and point out the one I have on top, which happens to be the San Diego store, those little white dots appear to be about four inches by three inches, four inches long by three inches wide; those are price tickets.

A. It is about two and a half by two and a half.

Q. It has the price on it, and in very small type, "Lerner Shops."

A. I would say it is smaller than the price.

Q. Is that unique to Lerner Shops to put price tickets in the window?

A. It is unique in many stores. In other words,

a lot of stores don't do it. We have done it in order to build up good will with the public.

Q. Did you observe whether or not the defendant puts price tags in his window? A. No.

Q. Do you know he does not? A. No.

Q. Did you ever check up? A. No. [83]

Q. Did you think it was important whether he did or did not?

A. I haven't been in San Jose since he opened his store.

Q. You said something about the physical layout; I suppose it is as true of the physical layout as it is to the other things to which you testified, that the physical layout varies from time to time with the ideas of businessmen and architects, and they change from time to time?

A. Our physical layout doesn't.

Q. Your physical layout doesn't change; it is uniform? A. That's right.

Q. And what is characteristic of your physical layout that is not common to other places?

A. The type of fixtures we use.

Q. Do you have a specially built fixture?

A. Yes, sir.

Q. Do you use the same fixture in all your stores? A. Yes.

Q. In all your stores at all times throughout the country? A. That's correct.

Q. In all your stores at all times throughout California? A. That's right.

Q. Do you know whether or not the defendant is using that particular type of fixture?

(Testimony of Graham Magee.)

A. No.

Q. By reason of that particular type of fixture you use, a person knows he is in your store and not in another?

A. I wouldn't know that.

Q. You wouldn't say that?

A. I wouldn't say that.

Q. Is that the purpose in having a particular kind of fixture, to use a particular type of layout?

A. The purpose is to [84] accomplish a particular picture in the physical appearance of the stores.

Q. You want to fix a particular impression on the buying public?

A. That's correct.

Q. And you have that in mind when you make up your physical layout?

A. That is correct.

Q. With the idea being when a person is in your San Francisco Market Street store, or your San Francisco Grant Avenue store, or in your Oakland store, or in your San Diego store, if he didn't look around to see what street he walked in from, he would realize he was in a Lerner Shop?

A. No, I wouldn't say that.

Q. Well, is that the idea?

A. No.

Q. Of course, it is true, you don't know whether the defendant's layout resembles yours in any respect?

A. I have never seen it.

Q. However, let me remind you that in response to one of Mr. Goldberg's questions as to what you did in the way of advertising, you did say that you consider your physical layout a form of advertising?

A. That's right.

Q. Then, it is true you are desiring to produce

(Testimony of Graham Magee.)

an impression on the public associated with a particular physical layout? A. That is correct.

Q. The reason I asked you that question again is that I thought a moment ago you said "No," but perhaps I was mistaken. Mr. Magee, have you been in San Jose since this action started? [85]

A. No, sir.

Q. Do you know where the highway runs through San Jose?

A. I drove there last summer.

Q. Well, did you or did you not notice where the highway runs, and whether it runs the same place?

A. I think it passes through the main street; I don't recall just——

Q. Isn't it a fact you don't know?

A. I am only testifying from my recollection. The main highway bisects the main street. I may be wrong.

Q. Your recollection, when you testified on direct examination, when you said that the defendant's store was on the main highway, south of San Francisco, your recollection was that the main highway was First Street in San Jose?

A. No; I don't remember those streets by name, but I remember when you come in by the highway you can see the Lerner Shop.

Q. Isn't it a fact that the highway runs several blocks away? A. I don't know that, no.

Q. You don't? A. No.

Q. Then, on the other hand, you also don't know it does not?

A. My recollection is it bisects it; but I may be wrong.

Q. Mr. Magee, you stated on your direct examination that it is your practice to start in a large community, in an area, the largest community in an area, such as San Francisco, and then extend into surrounding country, or trade area?

A. That is correct. [86]

Q. That is correct. Do you have a shop in Los Angeles?

A. We opened our first store in Los Angeles in 1930—February, 1930.

Q. And when did you give it up?

A. We lost the store in 1942.

Q. So you do go in some places and quit and go out? A. No, sir.

Q. You did in Los Angeles?

A. We lost our lease.

Q. But you did go out?

A. But we did only because we lost our lease. We don't usually go out.

Q. Wasn't there any other location in Los Angeles available? A. There was not.

Q. In 1942? A. No, sir.

Q. It is your testimony, and you want the court to believe that in Los Angeles Lerner Shops closed its business solely by reason of the fact that the lease, where it was, then expired, and it couldn't get another location?

A. We couldn't obtain the 100 per cent location.

Q. You were once in Sacramento, weren't you?

(Testimony of Graham Magee.)

A. I have been in Sacramento a number of times.

Q. I mean a Lerner Shop.

A. We never had a store in Sacramento.

Q. You never had a store in Sacramento?

A. No, sir.

Q. What did you have in that store that was leased to Lerner Stores Corporation of Maryland by Elise A. Drexler, the one concerning which you had negotiations with me and Judge Cerf?

A. We had no store there. There were tenants on the property.

Q. What happened in Sacramento when Dupen and Desen and another [87] person, a jeweler, in another store, were there, and you took the lease with the expectation that you, yourself, would open up?

A. We bought ourselves off the lease.

Q. You changed your mind?

A. No, we bought ourselves off the lease.

Q. You did intend to go in?

A. The proof of the fact is we have a lease next door to this property you speak about.

Q. When did you take this lease?

A. We bought the property in 1939.

Q. 1939? A. Yes.

Q. So, prior to 1932, you did intend to go into Sacramento? A. That's right.

Q. Then you changed your mind and bought yourself off the lease? A. That's right.

Q. Is that right? A. That's right.

(Testimony of Graham Magee.)

Q. This lease is dated the 12th of September, 1929. You bought yourself off the lease in 1932?

A. That's right.

Q. And from 1932 to 1939 you weren't in Sacramento?

A. We couldn't obtain a location we wanted.

Q. You had one right next door to where you are now; so that you weren't satisfied with the location?

A. We weren't ready to go into Sacramento at that time.

Q. Between 1932 and 1939 you weren't in Sacramento, because part of the time you had no intention of being there?

A. We found San Francisco and we went to Sacramento—— [88]

Q. Just a minute. Answer my question. During part of the time you had no intention of going to Sacramento?

A. Not until we opened in San Francisco.

Q. Not until you opened in San Francisco?

A. Then we made a more strenuous effort to get a lease.

Q. Is there any place where you had a lease and abandoned it for any reason? And I don't want you to tell me, or to take me too literally on the word "abandoned"—give it up, quit it, sold it, expired, bought yourself off? A. Whereabouts?

Q. Any place in California, or in any other location?

(Testimony of Graham Magee.)

A. That would take too much of the court's time to do it.

Q. Then, there were cases where you had leases and abandoned them for some reason or another and got out? A. That's right.

Q. Some of the time you had leases and never even opened a store? A. That's right.

Q. And Sacramento isn't the only one?

A. That's right.

Q. And it isn't the only one in California, is it?

A. No, we had a lease in San Jose.

Q. That you gave up? A. Yes, sir.

Q. When?

A. I would say in 1931 or 1932.

Q. So you had a lease in 1931 or 1932 and gave it up? A. That's right.

Q. How long did you have it?

A. I don't remember.

Q. And I suppose you gave it up because it ran out, or did you buy yourself out?

A. I imagine we bought ourselves out. [89]

Q. You got out of San Jose, is that right?

A. That is my recollection.

The Court: Have you much more?

Mr. Robinson: Yes, I have.

The Court: We will take a five-minute recess at this time.

(Recess.)

The Court: Proceed.

Mr. Robinson: What was the last question and answer, please, Mr. Reporter?

(Testimony of Graham Magee.)

(Record read.)

Mr. Robinson: Q. Were there any other places in the State of California where a similar situation occurred?

A. Those are the only two cities, according to my recollection.

Q. Returning to these photographs again, Mr. Magee, you state from time to time your lettering changed according to the ideas of the architect, or your own ideas? A. Yes.

Q. It changed from time to time? A. Yes.

Q. I call your attention to the fact that three of the six photographs introduced here, the Stockton, San Diego, and Huntington Park photographs, where a part of the lettering appears to be uniform, and what you call script, that they are dated, two of them are dated 1943, and one of them is dated August, 1942. They were built at about the same time?

A. The sign was put on Stockton in 1943; and the store was built, according to my recollection, in 1940. [90]

Q. What kind of a sign was it before?

A. It was a bronze lettering, similar to the lettering on the top of the building.

Q. Square lettering and block lettering; the top of the building still has a block lettering and you changed it to what you call script?

A. That's right.

Q. And those signs went up in 1943 and the other one in 1942.

(Testimony of Graham Magee.)

A. Huntington Park was 1943, and San Diego was 1942.

Q. So they went up about the same time?

A. That's right.

Q. And the next job was Fresno?

A. That was the last store we opened.

Q. That was after the defendant opened?

A. That's right.

Q. You had by that time abandoned that script which you had that was common to you in 1942 and 1943?

A. We haven't abandoned it, at all.

Q. You changed it to something else?

A. There was a different architect. The New York office didn't design the Fresno store.

Q. But, in any event, that Fresno store——

A. Has a different script letter.

Q. ——has a different script letter, and that was opened after the defendant's?

A. That is correct.

Q. And, as a matter of fact, after the suit was filed?

A. That is correct.

Q. By several months?

A. That is correct.

Q. Is that right?

A. That is correct.

Q. And Oakland and San Francisco stores are block lettering? [91]

A. That's right.

Q. You still maintain that this is script (indicating)?

A. Yes.

Q. That is in San Diego?

A. Yes, sir.

Q. You do not define script as meaning a simulation of handwriting, do you?

(Testimony of Graham Magee.)

A. No; it is generally known as script in the construction field.

Mr. Robinson: This is what we are talking about, your Honor (indicating).

The Court: I have seen them all.

Mr. Robinson: Q. You stated, Mr. Magee, that it is your policy to open up in the populous center and then move to a smaller community?

A. Outlying communities.

Q. Outlying communities?

A. That's right.

Q. And when you move to outlying communities you also take a 100 per cent location?

A. That's right.

Q. And your reasons for taking a 100 per cent location in the outlying community are the same as they are in the big city, aren't they?

A. That is correct.

Q. Of course, when you go into an outlying community you go down there to get business you wouldn't otherwise get in your central store?

A. What happens is, we have a certain amount of business there, like, take the concrete case, the San Francisco Market Street store has a considerable amount of business from customers now living in San Jose. When we opened our store in San Jose those customers, some of those customers may continue to [92] come to San Francisco and shop in San Francisco, but they are now buying their merchandise in San Jose.

Q. You don't mean to tell this court you open

(Testimony of Graham Magee.)

a store to take care of customers in San Jose otherwise taken care of by the San Francisco store?

A. But you get those customers as a nucleus for your business, and in addition you get other customers from San Jose and immediate surrounding towns.

Q. Isn't it a fact, Mr. Magee, and has it been your experience that when you do open in an outlying community and take a 100 per cent location in the outlying community for the reasons you have stated, that you still continue to get business in your own metropolitan location from that same outlying community?

A. I would say so, because the women of San Jose still come to San Francisco to buy merchandise, and when they do they will go into the San Francisco store, because it is a larger store, and would get a wider selection of merchandise and visit the San Francisco store.

Q. They come to San Francisco to buy, and your experience is they come whether they are vacationers or travelers or shoppers; they find their way to the 100 per cent location?

A. That's right.

Q. And if you are at the 100 per cent location they become potential customers by reason of that fact?

A. They usually see our store when they come there and come in and trade, because they know the Lerner reputation and merchandise. [93]

Q. I think I will ask you this: My older col-

(Testimony of Graham Magee.)

leagues would tell me I should not ask you this: Do you maintain, Mr. Magee, that the people come from San Jose to San Francisco for the express purpose of shopping at Lerner shops?

A. I would say some customers do.

Q. You wouldn't know how many, or what percentage? A. I wouldn't know how many.

Q. That is a guess on your part?

A. No, it is not a guess on my part; but I have frequently letters from women in cities such as San Jose, asking us why don't we open a store in San Jose, so they don't have to go to San Francisco to trade.

Q. How many letters do you have?

A. I would say they wouldn't be in great numbers.

Q. That is what I thought. Now, Mr. Magee, your San Francisco stores does business with people from New York? A. Yes, sir.

Q. It does business with people from South Dakota? A. I assume so.

Q. And it does business with people from every geographic point I might mention inside and outside of the United States, and that at times you have taken care of people from Timbuktu?

A. That's right.

Q. That is why you are in 100 per cent locations, because those are the crossroads of the world?

A. They come from Canada or Cuba.

Q. And you didn't receive any letters from anybody in Cuba [94] asking you to open a store there

(Testimony of Graham Magee.)

so they wouldn't have to come to the United States?

A. No, we haven't like that; but we have had letters they wouldn't have to go to Miami to shop if we had a store in Havana, and I went to Havana to try and find a location.

Q. How many letters?

A. I don't know how many letters. People are so interested in getting our merchandise that they want a store in their town.

Q. Now, about the name Lerner, you started out as a lawyer, didn't you, Mr. Magee.

A. Yes.

Q. Not as a salesman?

A. No, I was a lawyer.

Q. I may say you have become one. I mean, your enthusiasm for your profession is practically infectious.

A. I couldn't make a living in the law business, so I went into the merchandising business. [95]

Q. I don't want you to think that we have anything against the Lerner people in this case. Nothing is said in criticism here. I believe you said you were not aware of any other shop in California that used the name "Lerner" directly or in combination with the——

A. In the ready-to-wear field.

Q. In the ready-to-wear field, in any of the items you handle you don't know anybody else except the defendant handling them under the name "Lerner"?

A. That's right.

Q. That is true of all California, as far as you know?

A. That's right.

(Testimony of Graham Magee.)

Q. And I believe you stated it is also true of the West Coast, as far as you know?

A. That's right.

Q. It is also true of the rest of the country, as far as you know?

A. No, it is not.

Q. Tell us where there are Lerner's in the rest of the country, if you know?

A. There is a Lerner-Vogue in the Middle West.

Q. What is that?

A. Lerner-Vogue.

Q. Do you own that?

A. No, sir.

Q. How near is it to your shop?

A. They are in a great many states.

Q. What is that?

A. They are in a great many states.

Q. It is another chain company?

A. Yes, sir.

Q. Not connected with you at all?

A. That is correct.

Q. How many cities are they in, do you know?

A. I am guessing, and I would say they are in twenty cities. [96]

Q. In what states?

A. The Midwest. Their home office is in Kansas City.

Q. Then they are in Kansas, Missouri, Illinois, Idaho——

A. They go down towards the South.

Q. They handle the same kind of merchandise as you?

A. That's right.

Q. And have no connection with you?

A. No.

(Testimony of Graham Magee.)

Q. How long have they been in business, do you know? A. I don't recall.

Q. What name have they on their shops?

A. They now have J. S. Lerner-Vogue.

Q. J. S. Lerner-Vogue? A. That's right.

Q. Formerly they had another name?

A. They had Lerner-Vogue.

Q. Did you have litigation? A. Yes.

Q. What was the result of the litigation.

A. We settled it. In some cities they eliminated the use of the name "Lerner," and in other cities retained the use of the name "Lerner," but put "J. S." in front of it.

Q. That was by settlement with you?

A. That's right.

Q. Incidentally, by settlement with whom, the Maryland corporation or the California corporation?

A. The Lerner Stores Corporation.

Q. Which one of the Lerner Stores?

A. There is only one.

Q. There is only one now, the others having been in some way obliterated. How many years were they in business when they [97] first started?

A. I don't know, to tell you the truth. They had been in business long before I ever knew of them, and possibly before we went out West. When we found out about it, we started this litigation. We eliminated—they use a different name in the State of Texas as a result of this litigation.

Q. You say you don't know when they started, but when you found out, you started litigation and settled? A. Yes.

(Testimony of Graham Magee.)

Q. When did you find out?

A. I would say in 1935 or 1936.

Q. When you found out and when you were in litigation, I believe at that time you were general counsel for the corporation? A. Still am.

Q. And you handled the negotiations?

A. Yes.

Q. And you investigated how long they had in fact used that name?

A. I know I didn't. I have an attorney that handled it. I don't get into the litigation at all.

Q. Except this way? A. As a witness.

Q. What is your information on the subject as to the length of time they were in business prior to 1935, prior to the time you found out they were using the name?

A. I have dismissed that matter from my mind, but I would say ten years.

Q. They were in business at least ten years prior to 1935, is that right? A. That is my guess.

Q. And they were a chain store in the same line of business as you? A. That's right.

Q. I suppose the way you find out when somebody opens under a [98] name you consider an infringement is by someone coming in——

A. The customers.

Q. ——and asking you something, or you get the information some way?

A. It usually comes from customers. They say they have been in our new store in San Jose.

Q. Or something like that?

(Testimony of Graham Magee.)

A. That's right.

Q. And I suppose it is your position that no store could be very long in San Jose, Sacramento, or any place around here under a name which, for the purpose of argument, let us assume is identical with yours; you would hear about it, is that right? And if you didn't hear about it, you would assume it wasn't there?

A. That's right.

Q. And if it was there and you didn't hear about it, you would assume it wouldn't make any difference to you?

A. It would make plenty of difference to us.

Q. And if it was there and you didn't hear about it, then it wasn't doing you any harm?

A. I wouldn't say that, because, as a matter of fact, it is one of those things that couldn't happen.

Q. Couldn't happen?

A. No; if another store is opened, the customers or someone is going to tell us about it.

Q. Mr. Magee, would you think I was dreaming if I told you there is a Lerner store, a Lerner shop, or a store using "Lerner's" as the principal part of its name within three blocks of one of your stores in California, and has been there [99] long before the commencement of this action?

Mr. Goldberg: In ladies' ready-to-wear?

A. I would say you were dreaming.

Mr. Robinson: Q. Do you know of any such shop that handles such items as you handle?

A. With the name "Lerner's"?

Q. With the name "Lerner's" as the principal part of its name?

A. I do not.

(Testimony of Graham Magee.)

Mr. Robinson: Do we adjourn now, your Honor?

The Court: As long as we are here we might as well use the time.

Mr. Robinson: I think that is all at this time. I would like to have Mr. Magee return.

The Court: Have you any redirect examination?

Mr. Goldberg: I have some questions I think we might try to cover at this time.

The Court: Very well.

Redirect Examination

Mr. Goldberg: Q. Mr. Magee, these leases which plaintiff's counsel has given considerable expression to, which you have given up in one form or another, those were all during the early depression years? A. That is correct.

Q. And when was the last time that occurred, in what year? A. 1932.

Q. Has it occurred since then?

A. It hasn't.

Q. In those cases in which the plaintiff was involved, was it [100] necessary to pay a consideration in order to be released from the lease?

A. You mean where plaintiff's counsel was involved?

Q. I mean where the Maryland corporation was involved?

A. Oh, yes, we paid a consideration. It was a corporation of the New York Stock Exchange. We were on the New York Curb at that time, and it

(Testimony of Graham Magee.)

was in good standing, and we had to pay to get off these obligations.

Q. With respect to the leases you have taken and on which you have not yet constructed or reconstructed any stores, has the company means with which that is to be done? A. Yes, sir.

Q. In what manner has that been done?

A. We borrowed \$5,000,000 from the Metropolitan Life Insurance Company for post-war expansion.

Q. That money is in the hands of the company for that purposes at the present time?

A. It is reflected in our annual statement.

Q. After you lost your Los Angeles lease and it had expired and the landlord rented the premises to somebody else, I assume that is how you lost it?

A. I tried to stay, but he leased it to somebody else.

Q. Have you made efforts to find another one?

A. We have been negotiating for years.

Q. Did you find one?

A. We have another lease and we expect to make arrangements next year, providing we can make the arrangements.

Q. In Sacramento did you have difficulty in finding another comparable location?

A. We were forced to buy the property. We couldn't lease the property from the insurance company.

Q. So you bought the property in order to acquire a lease on it? A. That's right.

(Testimony of Graham Magee.)

Q. In connection with the operation of the stores in California and the operation of the stores elsewhere in the country, although you have separate corporations, in a number of instances wholly owned subsidiaries, how is the actual operation conducted as between the parent company and the subsidiaries?

A. Well, the parent company owns all of the capital stock of the subsidiary companies. Actually we have a buying corporation and that purchases merchandise in New York and distributes it to these state corporations. These individual state corporations, in turn, declare dividends, and the money eventually gets into the Maryland corporation, the parent company.

Q. What I meant is this: As far as management and operation are concerned, is that carried on by the individual companies or by the parent company?

A. The officers of the parent company are the same officers of the state corporations. In other words, I hold the same office in every state corporation as I do in the parent company.

Q. So actually the business in California is conducted as if [102] it were a division or a department of the Maryland corporation?

A. That is correct.

Mr. Robinson: We object to that on the ground it calls for the opinion and conclusion of the witness. By that I mean the legal facts speak for themselves.

The Court: I will overrule the objection.

Mr. Goldberg: Pardon me, your Honor?

(Testimony of Graham Magee.)

The Court: I will overrule the objection.

Mr. Goldberg: If the Court please, although I think most of the information which has been elicited or which appears in this annual report has already been elicited, but in addition there are certain photographs and lists of stores, and so on; I think it would be helpful if this report were put in evidence as an exhibit, and I will be glad to furnish counsel with a copy, although I don't have it here. He can examine it, and if there is any part he wants to examine Mr. Magee on or object to, that can be done during the course of the trial.

Mr. Robinson: I object to that on the ground the materiality is not sufficiently identified or explained. Does it pertain to nation-wide operation? And if it does, it is not material here. I believe the Court has in mind that we so far have confined ourselves principally to California. This is a report for the year ending January 31, 1945; after this litigation commenced, and obviously contains matters which first arose after that and should not be in the record at all. [103]

Mr. Goldberg: I don't think there is any basis for the objection, if the Court please, for this reason: There were many questions asked as to types of fronts, types of fixtures, general appearance, that weren't confined to California by counsel for the defendant, and questions asked as to what they did in all parts of the country where the company was going to carry on with its leases, which is a present question as well as a question that was rele-

(Testimony of Graham Magee.)

vant at the beginning of the action. This report covers the period commencing January 31, 1944 and covers a period which includes the time when the defendant's store was opened.

The Court: If it is offered in evidence we will have counsel for the defendant cross-examine this witness on 181 different stores. I don't see what the relevancy of putting in this whole report is, Mr. Goldberg.

Mr. Goldberg: Maybe I will have to tear off the cover and offer the photographs of a large number of stores and list of stores which appear on the cover.

The Court: You have already enumerated the number of stores, so you don't need that. Is that a photograph of all the stores?

Mr. Goldberg: It isn't a photograph of all the stores; it is just how much you can get on two covers. Some are exteriors and some are interiors. It shows a number of interiors which are of varying kinds, and a number of exteriors of varying kinds, [104] and varying letterings; and I think it gives the Court a better picture than is developed.

The Court: Do you have any objection to these photographs going in?

Mr. Robinson: The last remark of Mr. Goldberg indicates that certainly I will have to cross-examine the witness on these.

The Court: I thought he said they had standardized them.

(Testimony of Graham Magee.)

Mr. Robinson: That is what he said. It goes to impeachment.

Mr. Goldberg: It is for the purpose of clarifying that testimony, because if we have the report read in, I think your Honor would see that actually, although Mr. Magee made the general statement that they attempted to have uniform fixtures and uniform window backs, yet actually those things varied with the particular period when the stores were put in, and as to whether the stores as a whole, the fronts vary and the windows vary.

The Court: That leads me hopelessly astray; so you might find the defendant's store is like some and not like some.

Mr. Robinson: My objection is this: This is an attempt to impeach his own witness. He said the windows were not uniform, the signs were not uniform with certain limited exceptions; that the fixtures were not uniform with the exception of the mahogany floor; but that the interior was uniform, that which he called the physical setup. Now, Mr. Goldberg wishes [105] to introduce those for the purpose of showing it is not so.

The Witness: The cornices are the same.

Mr. Robinson: It will take all day to cross-examine him on that.

Mr. Goldberg: It doesn't make any difference if we are here all day. If there are actual photographs that clarify this situation, it seems to me we are entitled to have it clarified.

The Court: I don't see any objection to the pho-

(Testimony of Graham Magee.)

tographs, but I don't see how they are going to be of any importance one way or the other, if you say they are different in different stores.

Mr. Goldberg: They are only of importance for this——

The Court: If that is so, counsel for the defendant objects to it.

Mr. Goldberg: I think counsel for the defendant objects because he finds there are a lot of store fronts that are not particularly different from the defendant's store front.

Mr. Robinson: Oh, no.

Mr. Goldberg: Then you shouldn't object.

Mr. Robinson: Oh, no.

Mr. Goldberg: And furthermore, the interiors of the various stores do differ.

The Court: Mr. Goldberg, just what is it you are offering in evidence, the pictures of the stores?

Mr. Goldberg: Yes, your Honor. [106]

The Court: That is all you want?

Mr. Goldberg: I want to put in the record as a whole, but if there is any objection and the Court sees any objection, I am willing to waive that and offer just the pictures of the stores.

The Court: I will allow the pictures to be admitted in evidence, and you may have an objection.

Mr. Robinson: There is one thing we will want to examine Mr. Magee as to these. We object on the ground there is no foundation laid.

The Court: You don't object to the fact that they are not the pictures?

(Testimony of Graham Magee.)

Mr. Robinson: Oh, no, as to the identity of them, as to where they are from, I will have to examine Mr. Magee on that.

The Court: The pictures are admitted in evidence. Go ahead and ask the next question.

(The photographs were marked Plaintiff's Exhibit 7 in evidence.)

Mr. Robinson: Could I have a copy of that, Mr. Goldberg?

Mr. Goldberg: Yes. We will have it for you. It is in the office. I think that is all.

Recross Examination

Mr. Robinson: Q. Mr. Magee, you stated in response to Mr. Goldberg's question that those leases that you bought your way out of in 1932 and thereabouts was on account of the depression?

A. That's right. [107]

Q. By that you meant to say it was not profitable for you to continue to keep those leases?

A. We weren't ready at that time to expand our business and open new stores.

Q. In other words, the simple fact is you decided it wasn't profitable for you to keep the leases or to open stores where you did have leases?

A. The answer is, it was not profitable, or it was not propitious at that time to open new stores.

Q. So you decided to get out until it was?

A. We decided where we could buy ourselves out of leases to do so, and then at a later time open stores in those communities.

(Testimony of Graham Magee.)

Q. And your object in going in anyplace is to go in if you think it is going to be profitable, and stay out if it isn't going to be profitable?

A. That is true.

Q. You mean to say you go into a community if you think it is going to be profitable?

A. We go into a community if we thought it was going to be profitable.

Q. And if you go into a community where you thought it was going to be profitable, and if after passage of time you find it is not going to be profitable, you get out?

A. We never assumed at any time it wouldn't be profitable to have a store in San Jose. We believed it wasn't propitious to have one there, to retain the lease.

The Court: I think this matter has been gone into.

Mr. Robinson: That is all for today, your Honor.

The Court: Do you wish to examine the witness on those [108] photographs?

Mr. Robinson: We will be quite a while on those.

The Court: Go ahead, then.

Mr. Robinson: Q. Will you mark on that what store that is?

A. That is Fifth Avenue, New York.

Q. Just mark it right on the face of it. Let the record show I handed the witness Plaintaiff's Exhibit 7.

A. San Francisco, Philadelphia, Newark——

Q. Have you got them all?

(Testimony of Graham Magee.)

A. No; Cincinnati here; St. Louis; Durham, North Carolina; Brooklyn; El Paso, Texas; Lansing, Michigan; Florence, South Carolina; Park Chester; New York City; West Palm Beach, Florida; Newport News, Virginia; Miami, Florida. There are a few I just don't recollect.

Q. You have not identified any of the interiors, Mr. Magee.

A. No. I will be glad to try to do that. I think I would be guessing if I put the interiors.

Q. You are unable to identify any of the interiors?

A. I could say it was some city, but I would be guessing.

Q. Are you unable to identify any of the interiors because they are all alike, or all different?

A. Because the physical layout of the interiors is different. It depends upon the physical layout of the building. In other words, if you had a store 30 feet wide, you have no center aisle casing. If you have a 48-foot store, you have a center island.

Q. You are unable, however, to identify any of these interiors? [109]

A. If I took more time of the Court I could.

Q. The reason for your inability to identify them is not because they are all alike?

A. It is because I want to be accurate.

Q. Each of these differs materially from the other?

A. Yes, because I would say all of our stores differ in size. Very few stores would be of different

(Testimony of Graham Magee.)

size, so that the change in the physical layout of the store——

Q. So that the lighting, the physical setup, and so on, is all different?

A. The lighting changes with time.

The Court: Can't we cover this, gentlemen? I don't mean to be persistent, because I practiced law a long time myself, but let us assume after I have heard one fact once I have heard it, and don't repeat it a dozen times.

Mr. Robinson: That is right.

The Court: Let us not take the Court's time and your time on any other matters. Your case is not that this defendant simulated the front or the price tags, but the fact that he used the name. We are wasting a lot of the Court's time, gentlemen. I think I am competent to determine at this point and after the pre-trial that what is in issue is that the name "Lerner" as it is being used by this defendant in San Jose and under the circumstances presented by this case warrants the granting of an injunction. That is all that is involved.

Mr. Goldberg: That is right. [110]

The Court: So why should we spend two days when we can get down to the physical facts?

Mr. Goldberg: Of course, the physical facts surrounding are one thing, and that is simple; but in addition to that, we have the extent to which the operation of a store by the defendant in San Jose affects the business of the plaintiff. That is one thing which is, I think, incumbent on us to prove.

(Testimony of Graham Magee.)

The Court: Only if it appears that there is a reason for holding that unfair competition exists. If there isn't legal basis for unfair competition, it wouldn't make any difference whether the plaintiff's business is affected or not, because everybody has some competition in their business.

Mr. Robinson: That is true. I don't like to argue the matter at the beginning of the trial.

The Court: At this late hour I am telling you it is wholly unnecessary to take up matters of this kind, because I think you both agree that is what the issue is.

Mr. Goldberg: We say there isn't any question as to the infringement in the use of the name that is involved; but naturally, subsidiary to that, we have a burden of proving those things that entitle us to maintain this action.

The Court: I will grant that, Mr. Goldberg, but there isn't the remotest connection of what kind of an arrangement these stores have throughout the United States.

Mr. Goldberg: I never asked any question about the interior. [111] That was done by counsel for the defendant.

The Court: You offered the pictures and at the same time can we eliminate this phase of the examination as we did at the pre-trial conference, that the issue of the case is the use of the name in the manner in which the plaintiff charges it was used?

Mr. Goldberg: I don't think there is any other question.

(Testimony of Graham Magee.)

The Court: If we agree, all right.

Mr. Robinson: Mr. Magee was the one that brought it in.

The Court: Then I will eliminate any further examination on this subject and we will take an adjournment until tomorrow morning. Will you have in mind the understanding we made as to the issue we are to test?

Mr. Goldberg: If I have a misapprehension about that, I would like to be correct.

The Court: All right.

Mr. Goldberg: As far as the use of the name is concerned, I expect to prove it by Mr. Lerner. We have photographs, and it is admitted. We start with the proposition that Mr. Lerner opened a store and called it "Lerner's" and he made certain changes later. We have it in a deposition.

Mr. Robinson: "Lerner Apparel" is the name on the sign.

Mr. Goldberg: The question is whether that gives the plaintiff a right to have the defendant enjoined, and I think one of the things we have to prove in this case is confusion or [112] likelihood of confusion. We intend to prove actual confusion in that area, and we think when we have proved actual confusion and actual damage through loss of business, and actual prospects of loss of business, and the defendant made no attempt when he opened the store under a name used by the plaintiff, that he didn't differentiate that, we are entitled not to have him use that name.

(Testimony of Graham Magee.)

The Court: You are making an argument, and it seems to me the fact you are referring to in your statement you just made shouldn't take over an hour to cover.

Mr. Goldberg: We have several witnesses from the stores. We have the manager and we have department heads.

The Court: On the matter of people saying they were confused?

Mr. Goldberg: Yes. These same witnesses will prove that we are known as "Lerner's" even though we have the sign "Lerner Shops" on the front of the premises. That is an issue. And of course also we would show that the defendant carries the same type of merchandise, the same classes of merchandise we carry, and that the price at which they sell their merchandise falls within the price at which we sell our merchandise; so there is potential as well as actual competition for trade, which I do think that once we finish with Mr. Magee that our other witnesses should be relatively short.

The Court: We have nothing more of Mr. Magee, have we? [113]

Mr. Robinson: Oh, yes.

The Court: What do you want?

Mr. Robinson: I want him tomorrow on the manner in which the name is used. This has a picture of some twenty shops.

The Court: You have already shown how the pictures show the names.

Mr. Robinson: These go all over the country.

(Testimony of Graham Magee.)

The Court: I am not going to consider that. I don't see that that is material to the case.

Mr. Goldberg: I don't know that it is material. It is probably collateral. Counsel stressed a great deal the fact that on some so-called script we didn't open up a store in Fresno until after the San Jose store was opened. I have twenty more individual pictures of script signs. I haven't brought them in, because I don't think it is relevant, except the fact that we have been using the script letters in more recent years than the block letters only because the defendant stresses the fact that we use script and they use block.

The Court: I thought we had agreed it is the use of the name that is only material.

Mr. Goldberg: We do, yes. I didn't offer that for that purpose.

The Court: It doesn't seem to me there is anything particularly stereotyped. There is a certain similarity, but there are a great many differentiations. The ultimate fact [114] upon which you must rest your case is the use of the name "Lerner's."

Mr. Goldberg: That is basic, and other things may or may not have a bearing. I don't want to be met with the argument after the evidence is in that there is a difference between what plaintiff does and what the defendant does, because the plaintiff uses block letters and the defendant uses script letters, because there are any number of, dozens of signs where the company uses what you might call script, or the same type of thing, although not connected,

(Testimony of Graham Magee.)

that the defendant uses. Now, if it means anything——

The Court: I saw the picture of the defendant's sign, and as I remember it, it is a continuous line, and that is not true in the case of your sign. If we are going to get into those categorical differences——

Mr. Goldberg: I don't want to get into those categorical differences. I say that if we are going to be met with an argument after the evidence that we used block and they used script, and that tells the customer they are not us, I say that doesn't follow, because we have a lot of people who have seen our stores in many places.

The Court: But I couldn't issue an injunction because someone from Oshkosh went into this San Jose store.

Mr. Goldberg: I say I don't think it is relevant how the sign is written. [115]

The Court: I don't see how there is any need for argument now. They show the kind of lettering used by the plaintiff and the kind of lettering used by the defendant, and in my mind that is a very minor aspect, an extremely minor aspect. The only question involved is the use of the name.

Mr. Goldberg: I agree with your Honor. I think it is minor.

The Court: Is there anything else you want to examine this witness about?

Mr. Robinson: Yes, there is one matter I want to ask him about tomorrow morning. On this case I must point out the complaint alleges that we have

(Testimony of Graham Magee.)

deliberately adopted the script they are using, and I now understand——

The Court: I don't wish to interrupt you, but I don't see that there is anything to argue about. The pictures speak for themselves. I can see them.

We will take an adjournment until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Friday, April 27, 1945, at 10:00 a.m.)

Friday, April 27, 1945—10:00 a.m.

The Court: Proceed.

Mr. Goldberg: I understood Mr. Robinson had some questions on a particular subject he wanted to examine Mr. Magee on. There were a few questions I find I hadn't covered, and I would like to ask them first.

GRAHAM MAGEE

resumed.

Further Redirect Examination

Mr. Goldberg: Q. Mr. Magee, in its operations covering this past fiscal year and prior fiscal years, did you state plaintiff made a profit from those operations? A. Yes, it does.

Q. Can you tell us what that has been in the last fiscal year?

A. It was in excess of \$2,000,000.

(Testimony of Graham Magee.)

Q. Does the plaintiff have a net worth, I mean by that a balance of assets in excess of liabilities?

A. For the year ending January 31, 1945, it was in excess of \$14,000,000.

Q. Can you tell us what is the rate of mark-up which the plaintiff uses in the sale of its merchandise?

A. Approximately 33 percent average.

Q. Can you explain what that means? I mean, what is that with reference to the selling price or the cost?

A. In other words, you have a profit of—the original mark-up is [117] approximately 33 percent under your cost.

Q. That is what I mean. If you had an article that cost \$1 you would sell it for \$1.33, is that what you mean?

A. No, for \$1.50.

Q. In other words, the 33 percent is the gross profit on the sale?

A. That's right.

Q. Now, you stated yesterday that you didn't know of any other store operating under the name of "Lerner" or having "Lerner" in its name, now in this area, California or the West Coast, carrying merchandise that is sold in Lerner stores. In making that statement do you have in mind all articles sold by you?

A. I had in mind any store selling ready-to-wear; that is, coats, suits and dresses.

Q. What about millinery?

A. That was an article I wasn't referring to.

Q. Is millinery a substantial item in your operation?

A. No, it is not.

(Testimony of Graham Magee.)

Q. Do you sell it in all of your stores?

A. No, we do not.

Q. With respect to the various stores in California which you have testified to, there are now thirteen; is it or is it not common to all of those stores that they do business not only with the community where they are located but in the area surrounding that community?

A. The store does business from people living in the immediate vicinity and outlying districts.

Q. Yes. A. Yes. [118]

Mr. Goldberg: Those are all the questions I have.

The Court: Anything else?

Further Recross Examination

Mr. Robinson: Q. Mr. Magee, when you answered the question yesterday to which Mr. Goldberg directed your attention as to whether or not you knew of any other store on the West Coast using the name "Lerner" handling any item of merchandise that Lerner Shops handled, and you answered "No," you didn't at that time know of any, whether they handled a minor item or coats, suits and dresses?

A. What I was intending to answer, and I was maybe a little confused, I assumed we were talking about ready-to-wear, that is, dresses, suits and coats. I have known for some time that there are other stores in the State of California with the name

(Testimony of Graham Magee.)

“Lerner.” One sells men’s haberdashery and one sells ladies’ hats.

Q. You didn’t know about the hat shop yesterday? A. Oh, yes, I did.

Q. When you told me it was utterly fantastic—

A. I was referring to ladies’ ready-to-wear apparel, dresses, coats and suits.

Q. You never explained to me what became of your Lerner Blouse Company. You know what I mean by that; I mean the Lerner Blouse Company which later became Lerner Stores. As far as you are concerned, there is no further Lerner Blouse Company, is there?

A. We had two Lerner Blouse companies; one was [119] formed in New Jersey and one was formed in Delaware.

Q. And they changed their names?

A. Both changed their names.

Q. And became Lerner Stores Corporation of New Jersey and Delaware, respectively?

A. That’s right.

Q. And one of them went into bankruptcy?

A. No, they both went into bankruptcy.

Q. They both went into bankruptcy?

A. That’s right. In fact, three companies went into bankruptcy.

Q. All three companies went into bankruptcy?

A. No, three companies went into bankruptcy.

Q. Incidentally, about this company going into bankruptcy, you said Lerner of California bought its assets?

(Testimony of Graham Magee.)

A. That is not true; I didn't make that statement.

Q. Didn't you say one of the companies went into bankruptcy and Lerner of California bought its assets, immediately before it went into bankruptcy?

A. That's right.

Q. So is had the obligation of Lerner of California to pay for?

A. That's right. On merchandise you had notes; and on the fixtures, furniture, and equipment, and goodwill, there was capital stock.

Q. What was accomplished by that bankruptcy?

The Court: I thought we went into this before, counsel.

Mr. Goldberg: I don't want to object——

Mr. Robinson: I want to find out if they wiped out leases by that bankruptcy. [120]

The Court: We are getting pretty far afield.

Mr. Robinson: I agree with your Honor we are getting pretty far afield, but I have to meet the issue as it is presented. I will ask just one more question.

Q. Were any leases wiped out by that transfer and the bankruptcy of the corporation whose assets were acquired by Lerner of California?

A. I don't believe so, no.

Q. Is there a Lerner Blouse Company today?

A. No, sir, not owned by Lerner Company.

Q. Not owned by Lerner Company?

A. That's right.

Q. But there is a Lerner Blouse Company?

(Testimony of Graham Magee.)

A. Yes.

Q. It is quite a well-known outfit?

A. It is a manufacturer.

Q. It is a manufacturer? A. Yes.

Q. And it advertises, doesn't it?

A. I don't think it advertises.

Q. You don't know if it did or did not?— You look in the trade journals and are familiar with the business?

A. It may be in the women's business; I don't recall.

Q. Incidentally, does the Midwest outfit advertise, this other outfit? A. Lerner-Vogue?

Q. Lerner-Vogue.

A. J. S. Lerner-Vogue.

Q. What States are they in? A. Well——

The Court: Counsel, I don't want to be adamant about this thing. I know how lawyers feel, but it doesn't serve any useful purpose to go over the same ground again. I thought [121] we were agreed we were to get down to your Store in San Jose that is run by your client.

Mr. Robinson: I am satisfied to do that if Mr. Goldberg will make a binding statement that these issues are out of the case, because Mr. Goldberg is not precluded in a later proceeding in a higher court on these things permitted to go unchallenged.

The Court: In order that the record may be clear on the rights of both parties, I will say, for the record, the Court doesn't intend to make any finding concerning any of these matters and will

(Testimony of Graham Magee.)

confine itself to whether or not there is unfair competition by the use of this name under the circumstances, as they present themselves in the record, pertaining to the time the defendant was engaged in business in San Jose.

Mr. Robinson: The particular problem I was addressing myself to is now merely preliminary to bring the witness back to the previous state of conversation: Was this principle that is being urged here of a sort of right of expansion by osmosis into outlying areas? And I am about to show that Lerner Shops themselves don't believe in that principle, and themselves violated it. If the Court will indicate to me that I am not required to meet that, that is to say, that this point, that it may be deemed unfair competition on Mr. Lerner's part to have opened in San Jose, because, as Mr. Goldberg contends, he should have expected that once Lerner sets up in San Francisco, and in line with this policy—— [122]

The Court: I will say right now that the Court will exclude that issue. The only question, as I see it, in this case, is whether the use of this name on the street in San Jose with the nearest plaintiff's store in San Francisco constitutes unfair competition. I can't see that some secret intention on the part of plaintiff could possibly cause any rights to be vested in that.

Mr. Goldberg: I would like to have it appear, however, we do not stipulate or consent that this theory on which we rely, which is supported by au-

(Testimony of Graham Magee.)

thority, that there is an area of normal expansion to which we are entitled.

The Court: I understand that is your contention; but a theory of law can't take the place of facts.

Mr. Goldberg: That's right; we think there are facts that sustain our theory.

The Court: But you have put into the record that you had this lease, and you have it, and as I say, the Court is going to confine itself to the question as to whether or not the use of the name by this defendant in his store under the circumstances that the record will disclose, and having in mind the plaintiff's operation and store in San Francisco and Oakland constitutes unfair competition; and the other consideration, as to whether or not there is any intention to have a store there, the Court isn't concerned.

Mr. Goldberg: I would like to say this: We are not relying [123] on any unannounced or secret intention and we are not relying exclusively by any means on the fact that we had negotiated a lease which was in existence when the defendant opened his business; but we do rely on the general course of conduct in the operation of its business, that it is an expanding business, that it already had thirteen stores in California and was actually negotiating and had negotiated leases for many other purposes; that it was part of its practice to expand into areas like San Jose.

The Court: The record will show whatever the policy of the company is in that respect. I will say

(Testimony of Graham Magee.)

for the benefit of counsel for the defendant in that regard that I can't see anything to that point, at all.

Mr. Goldberg: I must say there are a lot of other courts that have seen it.

The Court: That may be true, but if that theory were correct, there would be no place in the United States that any man having the name of Lerner could open a store.

Mr. Goldberg: I think your Honor overdraws that. It would be true, if we were in New York City and we started to expand, we could not say, since we expect to get into California, this would be the case. But in this case this was an imminent situation. That is why the rule of law is applicable to us, whereas it would not be if we would say we hope to open in Canada, and nobody can open a store in Canada under the name of Lerner. [124]

The Court: I don't think it applies to this case. The record will show that, if a judgment should go against you. What your contention is, is in the record. So there can't be any question about it.

Mr. Robinson: I am in a paradoxical position. It is in the record and I agree with your Honor it has no application to the case; but at the same time it goes unchallenged and if Mr. Goldberg is successful in another forum and he has that unchallenged set of facts there, where does that lead me? In other words, I have to meet the issue, but I don't think it is relevant.

The Court: The issue is there for what it is worth.

(Testimony of Graham Magee.)

Mr. Robinson: What I was trying to prove and answer was that this so-called policy which Mr. Goldberg refers to, and upon which he claims a legal right, the policy of expansion as enunciated by the Lerner Company, where they go where they please, they, themselves, are violating their own policy.

The Court: I don't understand what you mean.

Mr. Robinson: They, themselves, would have no hesitancy in coming into San Francisco, San Jose, or any other place, if there was somebody else there doing business under the name of Lerner, or going into, say,—well, let us take a case where neither party is—let us go to Salt Lake City, where they and somebody else were equidistant from Salt Lake City, and they say, "You can't come in here." [125]

The Court: Just a minute. That is a matter of argument. All this witness can do is give his opinion.

Mr. Robinson: I want to show what they actually did.

The Court: You mean there is actually some other business doing the same kind of business as Lerner and they went into that field?

Mr. Robinson: Yes.

The Court: Go ahead.

Mr. Robinson: Q. You recall I asked you what States J. S. Lerner-Vogue was doing business in?

A. Yes.

Q. It is all one outfit, although it has two names?

A. Yes.

(Testimony of Graham Magee.)

Q. Do you know what States they are doing business in?

A. Their home office is in Kansas City, and they are in the States going south.

Q. Are you sure they are in those States?

A. Yes.

Q. They were there before you?

A. No, sir.

Q. In what States were they in before you?

A. I don't know of any.

Q. Isn't it a fact that you say they were there ten years before you discovered they were there?

A. That is my recollection.

Q. Are they in Kansas? A. Kansas, yes.

Q. And you are in Kansas?

A. I think they are in Kansas, I don't know. I don't know where their stores are located.

Q. Mr. Magee, do you mean to tell the Court——

A. I do not know whether they have any stores in the State of [126] Kansas.

Q. You know you have?

A. I definitely do.

Q. And you don't know whether they have stores in Kansas? A. I don't know.

Q. Then how do you know whether they were there before-or after you got into Kansas, if you don't know? A. I don't know.

Q. Then your answer that they were there before you——

A. I said I had no recollection.

Q. Now, what is your recollection?

(Testimony of Graham Magee.)

A. I have no recollection.

Q. At this moment you have no recollection?

A. I don't know whether they have any stores in Kansas.

Q. And you don't know whether through the Middle West Lerner Stores Corporation, the plaintiff, or one of its subsidiaries has stores in the same trading area as "J. S.," or Lerner-Vogue?

A. I know they do have.

Q. You know they do have?

A. That's right.

Q. In the same trading area?

A. That's right.

Q. And then you don't know whether they were there before you, or after you?

A. I don't know.

The Court: You mean there is not a single case you can tell us in these dates whether or not your store was there before them?

A. Surely; I know in San Antonio, Texas, we were there first.

Q. Is there any place you can say they were located before you?

A. No. [127]

The Court: Q. But you had litigation against them?

A. We brought suit against San Antonio, Texas, and kept them out.

Mr. Robinson: Q. These other places, you don't know whether they were near you, or in your trade area, and you brought no litigation against them and they brought no litigation against you?

(Testimony of Graham Magee.)

A. I don't know where they opened those stores.

Q. How far is Topeka from Kansas City?

A. I don't know.

Q. How far is Wichita from Kansas City?

A. I don't know.

Q. Can you give me an approximation?

A. I am guessing; Wichita may be a hundred miles from Kansas City.

Q. You travel that area?

A. I travel all over the United States.

The Court: Let us get on with this, gentlemen.

Mr. Robinson: Q. Do you consider Wichita in the trading area of Kansas City, where Lerner-Vogue has four stores?

A. I couldn't consider it so.

Q. If it is about 100 miles, it is about the same distance as Sacramento to San Francisco?

A. That's right.

Q. Do you consider Sacramento in the trade area of San Francisco?

A. I would say people in Sacramento trade in San Francisco.

Q. Your Market Street store does considerable business with people from Sacramento?

A. I wouldn't say "considerable business." They do some business.

Q. You would say they do considerable business in San Jose? A. They do business. [128]

Q. Would you say it is considerable?

A. I wouldn't say.

(Testimony of Graham Magee.)

Q. Do you know how this Middle West firm is referred to by the public?

A. "J. S. Lerner-Vogue."

Q. You mean when a customer in Kansas City, or in Texas, or in any other place where they have a store, refers to that store, he refers to it as "J. S. Lerner-Vogue."

A. They probably call it "Lerner-Vogue."

Q. Lerner-Vogue? A. That's right.

Q. They wouldn't call it "Lerner," would they?

A. That is what we are trying to stop.

Q. I mean, if I, as a customer, were referring to a certain one of four stores in Kansas City where I bought some merchandise, what do you think, or how do you suppose I would refer to the shop?

A. Lerner-Vogue.

Q. And you say that because the store is advertised as "Lerner-Vogue," is that right?

A. That's right.

Q. And your stores are advertised as "Lerner Shops," are they? A. That's right.

Q. Without variation?

A. That is correct.

Q. And as a matter of fact, has not some effort been made by your firm to implant the idea that "Lerner" and "Shops" go together, and I am referring to the plural? You always have the plural, never the singular?

A. That's right.

Q. Even if you have one store in a city you have the word "Shops?" A. That's right. [129]

(Testimony of Graham Magee.)

Q. Have you not made some effort to create an association of ideas so that the phrase, "The Lerner Shops" or "Lerner Shops" will be used, so that the word "Shops" will always be a part of the name?

A. Our trade name is "Lerner Shops."

Q. You have on some occasions taken steps to encourage the use of that?

A. I don't know what you mean.

Q. I mean, so that people, just as they refer to "Lerner-Vogue" and not to "Lerner's," according to you, or to "J. S. Lerner-Vogue," and not to "Lerner's," or to "Vogues;" you have also taken some steps to see that people refer to you as "Lerner Shops?"

A. No, they refer to us as "Lerner's."

Q. I didn't ask you that.

A. We have taken no steps other than have the name on our stores, "Lerner Shops."

Q. Why do you say they refer to you as Lerner's? Don't you refer to "Lerner-Vogue" as "Lerner's?"

Mr. Goldberg: I object to that as argumentative.

The Court: Of course it is. The Court is able to draw its own conclusion from the facts here.

Mr. Robinson: All right.

Q. Mr. Magee, you are quite familiar with the San Francisco Market store, aren't you?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit 1, which is

(Testimony of Graham Magee.)

a photograph of that store, and call your attention to a central column. You observe that, do you not? A. Yes.

Q. Do you remember the inscription that was on both sides of [130] that column, in metallic rays, likewise about four inches high, about the time of the commencement of this action, and for several months thereafter?

A. The only thing I can testify is as to what is there now. I don't know what was there four months ago. Someone may have changed that.

Q. That is what actually happened. Someone changed that? A. I don't know.

Q. And wasn't there the words on there, "This is the Lerner Shop?"

A. I do not know that.

Q. You do not know that? A. No.

Q. And you don't know that it was changed after that fact was mentioned in a pre-trial conference in this courtroom?

A. I do not know that.

Q. And you do not know that now the language is a little bit different, and there is a temporary sign put over that language?

A. I looked at it yesterday as I walked in the store, and it looked like a permanent sign.

Q. Did you make a note of whether it was a permanent sign?

A. It looked permanent to me.

Q. What did it say?

A. It said, "Lerner Shops," and it described

(Testimony of Graham Magee.)

the merchandise we sell there. I made no minute inspection.

Q. I hand you a picture of that column.

A. Yes.

Q. Is that a bronze sign, Mr. Magee?

A. That is very difficult to ascertain from this photograph. [131]

Q. What did you ascertain when you looked at it? A. It looked to me like a bronze sign.

Q. Isn't it a bronze frame with a card?

A. I looked at it yesterday.

Q. The textual material is on a card?

A. Yes.

Q. You didn't mean to indicate it was a bronze sign yesterday?

A. No, I meant it was a bronze frame.

Q. Under that sign there is underneath the sign the words "This is the Lerner Shop."

A. No, I don't know that.

Mr. Robinson: We will offer this as defendant's Exhibit first in order.

The Court: All right.

(Photograph was marked Defendant's Exhibit A.)

The Court: Anything else with this witness?

Mr. Robinson: We will be through with him very shortly, your Honor. I asked about the Lerner Blouse Company, and I hand you now page 12 of a trade paper, called, "Shortswear," or rather, "Women's Wear Daily," dated February 21, 1945, and I call your attention to the upper

(Testimony of Graham Magee.)

left-hand corner, where there is an ad which says, "Lerner, the House of Personality," and the signature under the ad is "Lerner Blouse Company."

A. That's right.

Q. That is one of your firms?

A. No, it isn't.

Q. That is a New York firm that sells blouses to the retail trade?

A. No, the Lerner's have a cousin, Ben Lerner, in the [132] blouse business.

Q. You made no efforts to put him out of business, did you?

Mr. Goldberg: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Robinson: We offer this as Defendant's Exhibit B.

Mr. Goldberg: I object to that, if the Court please, on two grounds.

The Court: I will sustain the objection on whatever ground you have. I think it is immaterial. Counsel may have it marked for identification.

(Page 12 of trade paper, "Women's Wear Daily," dated February 21, 1945, marked Defendant's Exhibit B for Identification.)

Mr. Robinson: Q. Now, Mr. Magee, among the things which you called advertising, and you recall you said store fronts, window background pictures, tickets in the windows with the name on, the physical layout, you said your store windows

(Testimony of Graham Magee.)

were characterized by what is called a billboard sign?

A. That's right.

The Court: He has already answered that. Why go over it again?

Mr. Robinson: Just one other question, your Honor:

Q. The billboard sign is not peculiar to Lerner's? A. We were the first ones to use it.

Q. But everybody else is using it now?

A. A number of our competitors are using it now.

Q. A number of your competitors are using it now? A. That's right.

Q. In other words, right up and down that same block, Zukor uses it, Grayson uses it, Hale Bros. uses it; I believe the two shoe companies use it. What you mean by billboard is the name of the firm in large letters against a background of some kind?

A. The front of the San Francisco store is a billboard front.

Q. Grayson also has a billboard front?

A. They have a temporary setup.

Q. But it is a billboard front, made up of war materials? A. I think it does.

Q. It runs higher than yours?

A. I think it does.

Q. Zukor's has one like yours?

A. I don't recall; he has a store, but I don't know what kind of a sign he has.

(Testimony of Graham Magee.)

Q. Don't you know he has a white marble background, just like yours? A. No, I don't.

Mr. Robinson: That is all.

Q. Oh, just one other question, Mr. Magee. Do you identify this sign? I better show it to Mr. Goldberg. (Photograph shown to Mr. Goldberg.) Do you identify that sign, the word "Lerner?"

A. Well, it says "Lerner."

Q. Can you identify it as one of yours?

A. It is my opinion it is not. [134]

Q. Does it resemble yours? A. No.

Q. It is a billboard sign, is it not, with the word "Lerner" in block letters? A. That's right.

Q. In conventional block letters?

The Court: Q. Well, you can't identify it?

A. No.

The Court: Ask the next question.

Mr. Robinson: Q. You don't know where that sign is? A. No, sir.

Q. Or where it has ever been? A. No, sir.

Q. Suppose I hand you part of the photograph with the word "shop" on it, and put it under that. Can you identify it now? A. No, sir.

Q. If there was a sign that size in the neighborhood of one of your principal stores, you would know about it, wouldn't you?

Mr. Goldberg: May we inquire as to what size counsel is talking about? The photograph doesn't indicate the size.

Mr. Robinson: I will give you the size. The area represented by this photograph is over 8x10 feet.

(Testimony of Graham Magee.)

The Witness: What is the question?

Mr. Robinson: Q. The area represented by that photograph, 8x10 feet, and the letters are over one foot high.

A. What is the question?

Q. If there was a sign that size in the neighborhood of one of your principal stores, you would know it, wouldn't you?

A. What sign, with the combination? [135]

Q. With or without, either way, the word "Lerner," a word in which you are greatly interested?

A. It all depends what business this tenant would be in. There is Lerner carpet stores and "Lerner Hat Shops."

The Court: You are referring, I suppose, to one of his stores?

Mr. Robinson: Not to one of his particular stores. I am referring to a neighboring store that handles items that he handles. He told us yesterday there was no store on the West Coast handling the goods he handles.

The Witness: I meant coats, dresses and suits.

Q. By other stores?

A. There is a men's hat shop called "Lerner." It is called "Lerner Millinery." I believe there is a carpet shop called "Lerner." I believe there are no others.

Q. Do you handle hats? A. Yes.

Q. Where is that hat store you mentioned?

A. On Mission street.

(Testimony of Graham Magee.)

Q. Exactly two blocks from your place of business? A. Yes.

Q. That sign is from that store.

A. I paid no attention to that.

Q. You know about it?

A. I paid no attention to that.

Q. I suppose that no one ever came in to you, exchanging a hat with you that they bought up the street, did they? A. I wouldn't know that.

Q. You wouldn't know that? A. No. [136]

Mr. Robinson: Will it be stipulated that this is the store at 1025 Market Street depicted in this picture, within two blocks of your store?

Mr. Goldberg: I can't stipulate to that. I don't know anything about it.

Mr. Robinson: We will show that. That is all.

Redirect Examination

By Mr. Goldberg:

Q. On those stores we have heard so much about in the Midwest, you said under an agreement some stores were called by a name other than Lerner's?"

A. Yes, "Joan-Eddy." That has become their trade name and they have agreed to market their merchandise under that name in all stores.

Mr. Goldberg: That's all.

The Court: That's all, step down, Mr. Magee.

Mr. Goldberg: Mr. Silverman, please.

MILTON SILVERMAN,

called as a witness by Plaintiff; sworn.

The Clerk: Will you state your name to the court, please?

A. Milton Silverman.

Direct Examination

By Mr. Goldberg:

Q. Mr. Silverman, what is your occupation?

A. I am the manager of the Lerner Shops at 831 Market Street, and the supervisor of the store at 220 Grant Avenue.

Q. Of Lerner's? A. Lerner's. [137]

Q. How long have you been employed by the Lerner Stores Corporation, or any of its subsidiaries? A. Approximately nine years.

Q. How long have you served—

Mr. Robinson: I think we ought to know which subsidiaries he is working for.

The Court: Don't interrupt so much, please, counsel. Every time you do it leads to a speech and an argument. If you have an objection, make it. You gentlemen are experienced lawyers and you are taking too much of the Court's time in a case with a simple issue to it. Again, I say at the risk of calling for your criticism, it is getting tiresome. Let's get on with the case.

Mr. Goldberg: Q. Mr. Silverman, how long have you been employed in your present position?

A. Two and a half years.

Q. Prior to that time where were you employed?

(Testimony of Milton Silverman.)

A. I was with the same organization in Cleveland.

Q. In what capacity?

A. Managing the Lerner Shops in Cleveland for approximately four and a half or five years.

Q. Prior to that time what sort of work did you do for the company?

A. Prior to joining Lerner's?

Q. No, prior to going to Cleveland.

A. I had the Syracuse store for a year.

Q. Can you tell us what items of merchandise the stores handle here in San Francisco?

Mr. Robinson: There is no dispute about that.

The Court: It has already been covered.

Mr. Goldberg: If the Court please, it is an important matter, I think, from the standpoint of unfair competition.

The Court: You have another witness already who has testified to that. It doesn't need any corroboration. The secretary testified in great detail as to the articles that were handled.

Mr. Goldberg: Then my next question of this witness is the range of price at which these items you handle are sold.

A. They are popular-priced. Do you want me to name each one?

Q. Yes, the range.

A. We can start with our blouse department. We carry blouses from a dollar to \$6.95. We carry sweaters from \$1 to \$6.98; we carry skirts from \$1.98 to \$7.98; we carry slacks from \$1.95 to \$6.98;

(Testimony of Milton Silverman.)

we carry slack suits from \$3.95 to \$14.95. We carry lingerie starting with slips that range from \$1.29 to \$5.98; gowns from \$1.98 to \$5.98.

Q. By "gowns" you mean nightgowns?

A. Nightgowns. We carry hosiery, ranging in price from 50 cents to \$1.35. In our dress department we carry dresses from \$4.95 to \$29.95, depending upon the season. In our coat department, we carry coats from \$9.95 to \$79.95.

Q. While you are on coats, you have both fur-trimmed and untrimmed?

A. All right; we carry untrimmed coats from \$9.95 to \$39.95; and we carry fur-trimmed coats, \$24.95 to \$79. In our suit department we carry suits from \$6.95 to \$39.95. [139]

Q. Does that about cover the items?

A. Approximately.

Mr. Robinson: Mr. Goldberg, I wonder, so I won't have to ask him later, as I intend to question him on these, if you could repeat them? I couldn't keep up with him. He mentioned furs?

A. No, I did not. We carry fur coats from \$39.95 to \$79. We carry separate fur collars, \$24.95 to \$29.95.

Mr. Goldberg: Q. Millinery?

A. Hats, 95 cents to \$4.95.

Q. Handbags: A. Handbags, \$1.95 to \$9.95.

Q. Do you personally spend any time on the selling floors of either of these stores?

A. I would estimate I spend about eight per cent of my time on the floor.

(Testimony of Milton Silverman.)

Q. Of which store?

A. Market Street store.

Q. Do you know where the customers of that Market Street store come from?

A. I would know where some of them came from.

Q. How do you determine that?

A. There are any number of ways. I O.K. a good part of the checks in the store. That would be one way. I also handle adjustments. That would be another way. From being on the floor I also see customers that continue to come back and you work up a talking acquaintance with them.

Q. With reference to checks and adjustments in those cases, does that include exchanges?

A. Yes, exchanges or refunds; or if something wouldn't wear well, I would handle it.

Q. In those cases you would get the names and addresses of the customers?

A. That's right.

Q. And in other cases you talk with the customers on the floor?

A. That's right.

Q. From the various means you have described, can you tell us where the customers in that store come from, the general area?

A. Well, the bay area. They come from down the Peninsula and they come from Sonoma and Marin County. There isn't any one specific area.

It is pretty spread out.

Q. With respect to the area between San Francisco, to and including San Jose, can you tell us, or have you any knowledge or any way of know-

(Testimony of Milton Silverman.)

ing or determining how many customers in any particular period you get from that area?

A. Well, there would be no accurate way, but I would say it would be substantial.

Q. Do you keep a record of exchanges?

A. Yes, we do.

Q. And those determine the nature—— Have you made a search of your records for any particular period? A. We have.

Q. For what period?

A. We took the credit slips for the period of July, 1944, to March of 1945.

Q. Both months inclusive? A. Yes.

Mr. Robinson: What period?

Mr. Goldberg: From July, 1944, to March, 1945.

Q. With respect to customers between, say, Burlingame and San Jose, have you determined how many of those have made exchanges during that period?

A. It wasn't Burlingame we took. We felt Burlingame was too close. We took San Mateo, and from south of San Mateo to San Jose there were approximately 300 transactions [141] during that period.

Q. Can you tell us approximately what percentage of your sales result in exchanges of this kind?

A. Between 6 and 7 per cent.

Q. Six or 7 per cent of what?

A. Six or 7 per cent of our total volume. That wouldn't necessarily mean customers, for the sim-

(Testimony of Milton Silverman.)

ple reason that if a customer bought three dresses and she exchanged one——

Q. So that in any event it represents 6 or 7 per cent of all of your transactions involved in these exchanges? A. That's right.

The Court: You mean that the exchanges represent 6 per cent of all the transactions, is that what you mean?

Mr. Goldberg: I think that is what the witness means, in volume.

The Court: It wasn't clear to me. You didn't mean that 6 or 7 per cent of the transactions were from San Jose, itself? A. Oh, no.

Mr. Goldberg: Q. Six or 7 per cent of credit transactions or exchanges, transactions generally——withdraw that. Of all of the business done, about 6 or 7 per cent result in exchanges of one kind or another?

The Court: He said, of that group about 300 transactions were south of San Mateo.

Mr. Goldberg: That's right.

The Court: What you are trying to bring out now is what [142] percentage that is of 6 or 7 per cent.

Mr. Goldberg: My question is now a matter of deduction, purely, that of their total business, 6 or 7 per cent, from their experience results in exchanges, that that means that roughly 300 would be 6 or 7 per cent of the business they actually do between San Mateo and San Jose.

(Testimony of Milton Silverman.)

The Court: You better ask the witness what that 300 represents in percentage.

Mr. Goldberg: Yes.

Q. Can you tell us, Mr. Silverman, of these transactions between San Mateo and San Jose, which resulted in exchanges, what percentage was that of all the business that you did in the same period between San Mateo and San Jose?

A. If I remember correctly, there were approximately 263 transactions that I actually checked. Taking those transactions, I found a monthly average of the number of people in that specific area that exchanged merchandise in our store. In that way I got a monthly average, and from that it was easy enough to determine, that is, in other words, if 7 per cent, if that figure occurred, 7 per cent, it was easy enough to find 1 per cent, and approximately the 100 per cent, that is, the total number of people from that area that came to our store.

Q. And what was that determination?

A. 451 plus.

Q. Customers? A. Per month.

Q. From that area?

A. From that area. [143]

The Court: Have you any figures to show what the total number of customers is?

A. In our store?

Q. Yes. A. No, sir.

Mr. Goldberg: Q. You don't keep a record of individual customers?

Mr. Robinson: We move to strike all this testi-

(Testimony of Milton Silverman.)

mony on the ground it is wholly irrelevant, because we don't know what 450 is, what percentage of what? A. Well——

The Court: Just a minute, Mr. Silverman. Counsel, that goes to the weight. I will overrule the objection.

Mr. Goldberg: That's right.

Q. You could determine the number of transactions in the store in a year?

A. Very easily.

Q. But you wouldn't know the number of individual customers represented by those transactions? A. That's right.

Q. You would only know that with respect to those customers who have given you checks, or those who have made exchanges?

A. That is correct.

Q. Or those who buy on some lay-away plan, where you get the name and address?

A. That's right.

Q. The ordinary cash sale, you just get the cash and deliver the merchandise, without any record of the person? A. That's right.

Q. Mr. Silverman, in your period on the floor, do you hear any [144] of your customers refer to the store or the company by any particular name?

A. They refer to us as "Lerner's."

Mr. Robinson: Just a moment. I move to strike that until the question is asked. You merely asked if he hears.

(Testimony of Milton Silverman.)

The Court: I will allow the answer to stand. It is obviously responsive.

Mr. Goldberg: Q. In addition to references by customers to the name, you say you receive checks from customers? A. We do.

Q. And can you tell us what the procedure is usually when a customer is about to make——

The Court: Can't you shorten this, Mr. Goldberg? Maybe counsel will stipulate you receive certain checks and letter addressed to "Lerner's"?

Mr. Goldberg: Well, I have here some checks which I will show counsel. Some are originals that are not yet deposited, and other are photostatic copies made before they were deposited.

The Court: Can't we shorten this, gentlemen, by entering into a stipulation that the plaintiff's store receives letters and checks addressed to Lerner Shops and Lerner's and other designations?

Mr. Goldberg: Yes, and I would like to have this testimony, if the Court please, that the usual procedure of a customer about to give a check is to ask the person on the floor, or [145] the department manager how to make out the check.

The Court: All right.

Mr. Goldberg: Q. Is that the way it is done? They ask either you or the department manager how to make out the check?

A. That is correct.

Q. Can you tell us how that request usually is made?

(Testimony of Milton Silverman.)

A. Well, the usual question is, "Shall I make it out to Lerner's?"

Q. And what is that customer told when he asks that question?

A. They are told to make it out to "Lerner Shops."

Q. In spite of that, there are customers who make out the checks without asking the question?

A. There are any number of regular customers who make out their checks before I reach them.

Q. Where checks are made out without asking any questions, how are they generally made out?

A. I am sorry. Ask that question again.

Q. When checks are made out without asking any question, how are they generally made out?

A. I would say the bulk of them are made out to "Lerner's."

Q. Now, I will show you some original checks——

The Court: How could this witness possibly know such a negative fact as that? I am not trying to cut you off.

Mr. Goldberg: We inquired into it, and this is what we found by talking to Mr. Silverman and the department heads, and that is when customers——

The Court: I don't see the materiality of the mental [146] processes the customers go through. I understood counsel will stipulate once in a while checks are made out to "Lerner's" and once in a while checks are made out to "Lerner Shops."

Mr. Goldberg: I know, but we say our business

(Testimony of Milton Silverman.)

is known in the minds of the public as "Lerner's," and therefore customers who use their own idea of our name make out their checks as "Lerner's"; and if they ask how to make it out, they are told, "Lerner Shops." That is the purpose of the examination.

Mr. Robinson: I move to strike it all on the ground I have previously stated. I object to anything further in the way of testimony about what was in the minds of the public.

The Court: That's right. We have firms like I. Magnin & Company. I have made out checks to Magnin frequently.

Mr. Goldberg: If you were making out your check for Joseph Magnin, though, you would make it out, not for Magnin, but for Joseph Magnin.

The Court: I am not sure of that, Mr. Goldberg. I don't know whether you would, or not. I don't see that would help the Court in knowing what the mental processes of the public are. I have no doubt that many people, and to save time I will assume probably speak of it as "Lerner's" and make out checks to it as "Lerner's."

Mr. Robinson: I will stipulate, as I did in the pre-trial conference, the manner in which people refer to it. The possessive is used. Judge Goodman's name is Goodman, but [147] when people eat at his house, they say, "I ate at Goodman's."

The Court: Let us not argue. Do you stipulate that some people make out checks as "Lerner's"?

(Testimony of Milton Silverman.)

Mr. Robinson: I will so stipulate.

Mr. Goldberg: Some, yes, but I think it ought to be shown that is a substantial part, and the number of these checks mathematically, in proportion, would have some bearing as to whether only a few called it "Lerner's," or whether the majority of the people who come in there, without knowing how large a majority, refer to it as "Lerner's." I will be glad to ask that question of the witness and we can rest that part of the case.

The Court: All right.

Mr. Goldberg: Q. Mr. Silverman, first with respect to how the people in the store refer to it, would you say that the majority refer to it as "Lerner's?" A. Definitely.

Q. With respect to those who make out checks, who don't get an instruction, would you say the majority make it out as "Lerner's"?

A. I would say a good portion of them do.

Q. Mr. Silverman, could you tell us with respect to the items of merchandise that you carry in your Market Street store, or the Grant Avenue store, that bear a particular price, now that compares with the price that that same merchandise is sold in other stores on Market Street?

A. We under-sell them.

Q. Can you give us an approximation of the extent?

A. Well, our \$7.95 dresses are sold in the Emporium for \$8.98 and \$9.98. [148] We have coats

(Testimony of Milton Silverman.)

in our store at \$18.95 that are sold by our competitors from \$19.00 to \$22.95.

Q. Would you call the merchandise that is sold in your store on Market Street or on Grant Avenue as "Low end" merchandise?

A. We are a popular-priced organization.

Q. Have you personally had any contacts with persons coming into the store who have referred to the defendant's store in San Jose?

A. I have.

Q. Can you tell us when and what?

A. Well, on quite a few occasions I remember being called over by a salesperson, or one of our assistant managers, and I have had to correct customers about the impression they were laboring under, which is that the organization in San Jose was not a part of ours.

Mr. Robinson: I object to that on the ground it calls for the opinion and conclusion of the witness. If the answer is read back your Honor will see.

The Court: I think that part of the answer where he said he had to correct the impression may go out.

Mr. Goldberg: Q. Tell us more specifically in substance what was said to you by the persons in question, and what you said?

A. Specifically, in the course of the conversation the customer would say he was, he would say, "I was in your store in San Jose." I would say, "We have no store in San Jose." She would say, "But I was in your store in San Jose." So then

(Testimony of Milton Silverman.)

I would go on to explain to her about that, that we didn't have [149] one, but sometime in the immediate future we would.

Q. Did that happen on more than one occasion? A. It did.

Q. Can you tell us when, approximately, was the last time? A. Tuesday of this week.

Mr. Goldberg: That is all.

Cross-Examination

Mr. Robinson: Q. Mr. Silverman, did you give instructions to your girls to call you over every time an incident like that arose? A. I did.

Q. And each time did the person repeat to you, "I was in your store in San Jose"?

A. To a great extent.

Q. What do you mean by a great extent?

A. I mean they wouldn't say the exact same words you quoted, but it would have approximately the same meaning.

Q. In other words, after this litigation started, you instructed your sales girls that any time any incident arose which indicated to you that a customer believed that a certain store in San Jose was one of Lerner Shops you would be called over?

A. That's right.

Q. How many times were you called over since June, 1944?

A. I have no occasion to remember that amount. It was quite often.

Q. Once a week?

A. I would say it was oftener than that.

(Testimony of Milton Silverman.)

Q. How often? A. I don't know.

Q. You can't say whether it was twice a week?

A. It was oftener [150] than twice a week; but, as I say, I have kept no records.

Q. You knew there was litigation pending, didn't you? A. I did.

Q. And you didn't keep records?

A. No.

Q. And you didn't make any estimate of the number of times you were called over?

A. No.

Q. And the last time was last Tuesday?

A. Yes.

Q. Did you say that the substance of the conversation was, the customer would say, "I was in your store in San Jose," and you would say, "That is not our store"? A. That's right.

Q. You say you made a monthly average of these exchanges? A. That's right.

Q. Do you have the figures here?

A. No, I had them on my lunch hour, but they are available.

Q. You made no schedule of them, did you?

A. No.

Q. Do you remember generally whether the number of exchanges from that area increased progressively from last June until July—I think the closing date is the 31st of March?

A. I don't understand your question.

Q. In other words, you went over them on a monthly basis, is that right?

(Testimony of Milton Silverman.)

A. That's right.

Q. And each month the number would be different?

A. No, I didn't take it that way. Our credit books contained 50 transactions, so I just instructed one of my cashiers to pull out the exchanges and credits for that particular period. When she did that I had a total, which I divided by the number [151] of months for an average monthly average.

Q. Oh, I see. You didn't take it by months, but you got the total of that period, and how many exchanges did you get from that area for that period? A. I think 263.

Q. Then you took that and multiplied—You assumed that to be 7 per cent?

A. That's right.

Q. Of course, it is the transactions from that area, or total dollar volume?

A. Number of transactions.

Q. From that area; and then you got 100 per cent from that area? A. That's right. [151a]

Q. Then from that 100 per cent, from San Mateo to and including San Jose, you got 450 customers a months?

A. It is between 400 and 450 a month.

Q. You don't know what portion of them come from San Francisco? A. No.

Q. You don't know what proportion of them come from Palo Alto? A. No.

Q. You don't know what proportion of them come from any other communities in that area,

(Testimony of Milton Silverman.)

such as, I might mention, Cupertino, Los Altos, Los Gatos? A. That's right.

Q. What area did you take in?

A. San Mateo south, including San Jose.

Q. That included Los Altos?

A. That's right.

Q. You don't know whether there were more in March than there were in July, or vice versa?

A. I do not.

Q. You don't know whether the number of customers has increased or decreased from that area?

A. I don't.

Q. Mr. Silverman, you are familiar with that department store which also has a branch in San Jose, Hale's? A. I am.

Q. And you refer to it that way, don't you, and so do your customers?

A. I haven't had any occasion to refer to it. What do you mean?

Q. Well, how do you refer to that outfit I referred to? A. I imagine Hale's.

Q. You know what the name of it is?

A. Hale's. [152]

Q. It is Hale Brothers, isn't it?

A. That I don't know.

Q. For what subsidiary are you now working?

A. Lerner Shops of California.

Q. You are working for Lerner Shops of California? A. I am.

Q. You heard Mr. Magee say your mark-up was one-third, based on selling price?

(Testimony of Milton Silverman.)

A. He said it was approximately 33 1/3 per cent.

Q. Is there a difference between one-third and 33 1/3 per cent?

A. I just wanted to quote Mr. Magee exactly.

Q. That is based upon selling price, is that correct? A. Based upon retail.

Q. And you said that you didn't undersell everybody, or did I understand you correctly?

A. Well, that is pretty broad. We undersell most of our competitors.

Q. I see. Isn't it a fact that you and Zukor's sell for about the same price?

A. That is not so.

Q. Is Zukor's higher than you? A. Yes.

Q. By how much?

A. By 10 to 15 per cent.

Q. Then their markup would be between 40 and 45 per cent?

A. Well, that is simple arithmetic.

Q. Well, you wanted to be so precise.

Mr. Goldberg: That is assuming they both start with the same cost.

Mr. Robinson: Well, everybody knows what mark-up is. You asked him, and I didn't ask for a dictionary definition. The basis of [153] calculation, as I take it, on the way they figure these stores, it is one thing if they handle higher priced merchandise; if you buy something for \$100 and sell it for \$150, you are in a higher price range in one respect. If you buy something for \$10 and

(Testimony of Milton Silverman.)

sell at \$12, you are in two low categories, one with respect to selling price and one with respect to mark-up.

Q. Now, with respect to mark-up, you and Zukor's handle many items in the same classification?

A. We carry the same coats, suits, and dresses.

Q. Will you give me an example of an item that you would sell for any price—take, for example, what would you sell a dress for?

A. For example, print jersey dresses which they have had, our price was \$7.95, which they had at \$8.95.

Q. Would you say generally Zukor is higher than you? A. I would say so.

Q. Is that true of Grayson?

A. I would say Grayson is more competitive?

Q. You would say Grayson is more competitive?

A. Yes.

Q. In other words, Grayson is still a little higher than you?

A. I wouldn't say so. They are pretty close.

Q. Then their mark-up is somewhere in the neighborhood of 30 per cent. Can you name anyone else who is pretty close? A. No.

Q. You and Grayson are in one classification, and there is no one pretty close. You gave a price range here. As of what year [154] did you give that?

A. I didn't have any specific period. I was covering no specific period. Prices in the spring vary with prices in the fall.

(Testimony of Milton Silverman.)

Q. Mr. Silverman, you are familiar with OPA Regulation No. 330? A. I am.

Q. Was it or was it not higher than when it was in existence?

A. It is one that controls your ceiling prices.

Q. You mean first No. 330 was called the highest price line regulation? A. That is right.

Q. You remember that?

A. That is right.

Q. Will you please tell us what that was?

A. It was one that limited the highest price line we could carry in a specific store.

Q. In other words, if you had dresses and your top dress was \$29.95—is the figure you have here—do you remember at that time what your highest price was? A. No, I do not.

Q. It was not \$29.95, was it?

A. I don't know.

Q. Well, what was it? A. I don't know.

Q. You know you went into a higher price line since then?

A. At the time that went in, I was in Cleveland at the time, and our price lines vary in different stores.

Q. When was the highest price line considered?

A. I think it was March, 1941.

Q. When was it revoked?

A. I don't know.

Q. Do you mean to say as manager of Lerner Shops in San [155] Francisco and in charge of

(Testimony of Milton Silverman.)

things like this you can't tell us when the highest price line regulation was revoked?

A. That's right.

Q. You know it was revoked?

A. Definitely.

Q. Within two years since you have been with the San Francisco subsidiary?

A. I do not.

Q. What was that? A. I do not.

Q. Is it not a fact that it was revoked sometime in the latter half of 1944?

A. I don't know.

Q. Is it not a fact that your price ranges increased substantially as soon as that regulation was released? A. I would say no.

Q. Is it your testimony that your price range of blouses before the change in the regulation was \$1 to \$6.95? A. No.

Q. What was it before?

A. I don't remember.

Q. And how about sweaters? You have here \$1 to \$6.98. What were they before the rule was released?

A. I am guessing, but I would say \$5.98.

Q. But that is a guess? A. Yes.

Q. But there was a difference?

A. There might be.

Q. And skirts—you have your price range \$1.98 to \$7.98? A. That's right.

Q. Was it different before?

(Testimony of Milton Silverman.)

A. I really don't know, because I have had no occasion to check them.

Q. You don't know. Would it be the same as to the other items [156] right down the line?

A. That's right.

Q. You are sure the range of coats has gone up, you say. You have top line, \$29 to \$79.95. You have never had that range?

A. I think our ceiling was \$59.95.

Q. And when the top price range was released, you went to \$79.95? A. We might have.

Q. Is it a correct statement that the top price range was a form of price ceiling, that it is a base ceiling and you cannot handle an item for a higher price than you handled it in the base period?

A. That's right.

Q. How about untrimmed coats? What was your top price then, before the regulation, if you know? A. I don't know.

Q. You think there was and you don't know what it was, or don't you think there was?

A. I think there was, but I don't know.

Q. There was a difference, but you don't know what it is?

A. There may have been some differences, but I don't know what they are.

Q. Consequently, the prices you have given were not in effect when the defendant opened his store?

A. I wouldn't say that.

Q. If the defendant opened his store before the relaxation of the rule, then that would be the case,

(Testimony of Milton Silverman.)

assuming it to be the fact that the rule wasn't relaxed when he opened his doors?

A. If that were so——

Q. You have your price ceilings as 1944 in your store, haven't you, showing the top price line?

A. We have. [157]

Q. And from time to time, as you add a new line you are required to file with the OPA?

A. Just a minute. We operate through central pricing, so I am not required to file anything. The information when I get it is all cut and dried.

Q. But you know it has been done?

A. I really don't know, because quite frankly, I am not familiar with the technical part of the operation.

Q. Do you have your ceilings in the store for 1944?

A. There is; but quite frankly, I haven't referred to it once since I have been in the store.

Mr. Robinson: Could I ask you to bring that book, particularly that part which would show the change over after the relaxation of the highest price line?

Mr. Goldberg: That is, assuming the book has anything like that in it. We will object to bringing whatever books we have and let you see what is in them.

Mr. Robinson: Q. Mr. Silverman, did you take the names of any of these people who said to you, "I was in your San Jose store," and you said, "No, you weren't," or words to that effect?

(Testimony of Milton Silverman.)

A. No, I had no occasion to.

Q. You did not? A. No, I did not.

Mr. Robinson: That is all.

The Court: Q. Mr. Silverman, you have been in business here for some time?

A. In San Francisco for a little over two years.

Q. I wanted to ask you this question: I suppose that people come from the outlying communities to San Francisco to trade. That is a part of the general public patronage here in San Francisco?

A. That is correct.

Q. And I suppose that all stores of any consequence get a certain amount of trade from the outlying cities? A. That's right.

Q. Lerner's, as well as other stores?

A. That's right.

Q. Have you any way of knowing or have you made any investigation to determine the percentage of total business that comes from outlying areas of San Francisco with relation to the amount of local patronage? A. No, sir, we haven't.

Q. Do you know anybody who has made that sort of a survey among the local merchants?

A. No, we don't.

Mr. Goldberg: I can answer that if the Court wants to know. The Chamber of Commerce have figures on surveys that have been made. I think one was made by the National Cash Register Company and others, and the general assumption of the Chamber of Commerce and department stores to whom I have talked in San Francisco is that about

(Testimony of Milton Silverman.)

75 per cent of their business comes from San Francisco and about 25 per cent from outside San Francisco.

The Court: That includes Oakland, too?

Mr. Goldberg: That includes the Bay Area and the Peninsula area, and of that figure about 9 per cent of the business comes [159] from the Peninsula area.

The Court: So, the Court can safely assume that if we were to break the outside area into its component parts, it would result in fractions of percentages coming from specified communities in the area surrounding San Francisco?

Mr. Goldberg: As I say, that figure is about 9 per cent, coming from the Peninsula area; that is, from San Francisco to San Jose, and that comes off the 25 per cent, the balance being from Alameda and Marin County and other areas.

The Court: This is not probably particularly evidentiary, but it is a subject matter that is not particularly disputable. Do you want to ask any other questions?

Mr. Robinson: Mr. Goldberg, I haven't the slightest doubt in the world what you say is true, and if it is of any use, you can introduce it in evidence.

Mr. Goldberg: It is the best information I was able to get, but I wasn't able to get it in the form of admissible evidence, and that is the reason I didn't present it.

(Testimony of Milton Silverman.)

The Court: I don't think that would be a disputable matter.

Mr. Goldberg: I might say this: I have also made inquiries of department stores as to the number of accounts that come from particular areas, and their estimate based upon the fraction of their business that is represented by charge accounts, and it is only an estimate, that about 3 per cent of these major [160] department stores' business comes from San Jose. It wasn't in a form in which I could put it in evidence, so I haven't tried to present it; but I have gotten the best that the credit people in these stores could give me after checking their records.

The Court: I am rather surprised, as the casual observance a layman would give, that it would be that. The proportion of San Jose to the whole general area wouldn't be anywhere near that.

Mr. Goldberg: I will tell your Honor how that is arrived at. It is an estimate based upon actual charge accounts. The charge accounts run about one-third of their business. It is less now. It is purely an estimate, because it may be that more charge accounts would be allocatable down there. It is purely an estimate. That is why I haven't offered it.

Mr. Robinson: There would be more charge accounts in the outlying places than cash business, because the charge account is the kind of person who goes in and buys a lot of things and has it sent;

(Testimony of Milton Silverman.)

whereas a person who buys a blouse for a dollar isn't likely to be from San Jose.

The Court: I was just interested to see whether or not there had been surveys made. I would venture the guess that even if the surveys were made, the net result would probably be about the proportion of the relation of the population, generally speaking. [161]

Mr. Robinson: That couldn't be, your Honor, because that would exclude all the local business.

The Court: No, out of town.

Mr. Robinson: Take all the out-of-town business and divide it by the population. Yes, I would say that.

The Court: There is a certain percentage you could attribute to outside of San Francisco. The percentage of San Jose to the outside communities, taking that, you would find that business is fairly relatable to that proportion.

Mr. Goldberg: There are some factors that have to be taken into consideration. In Oakland you have several large outstanding department stores, such as Emporium-Capwell, who do a major portion of the business.

The Court: Aren't we sort of prematurely arguing?

Mr. Robinson: I was going to mention San Jose has Hart's and Hale's. I would say from here to San Mateo you have a large commuting area.

The Court: I think the Court can take judicial

(Testimony of Milton Silverman.)

notice of the general locale. I wanted to **know** whether or not there had been a survey **made**.

Mr. Goldberg: I started to inquire among the real estate people, and they have a certain rule of thumb, bases they go by, but they get it second or third hand, and I couldn't use that.

The Court: Q. Mr. Silverman, in line with this general [162] examination, about how far north in the communities north of here do you know that people trade in your store on Market Street?

A. We get them from Sonoma County.

Redirect Examination

Mr. Goldberg: Q. What about Red Bluff? I simply have here a check that is payable on a bank in Red Bluff. Do you recall you have customers from that far away?

Mr. Robinson: This is all very interesting, Mr. Goldberg, but we have checks in our store for Black Hills, South Dakota.

Mr. Goldberg: Q. What about Sacramento?

A. We do.

Q. What about Watsonville and Salinas?

A. We have customers from all that section.

Q. You were asked whether you could tell from your examination of the credit slips which you analyzed came from Palo Alto or Redwood City or San Jose.

A. We can.

Q. I will hand you some of the slips out of the group you gave to me, and see if you can determine here—perhaps we can stipulate that the number we have here would add up to a certain amount.

(Testimony of Milton Silverman.)

I might say I have personally added these marked "Redwood City," and there are thirty-one of those. There are thirty even from Palo Alto. There are thirteen from San Jose. And I would like to have these in evidence.

The Court: You don't want to encumber the record?

Mr. Robinson: The figures will suffice for the record.

The Court: Will you accept counsel's statement? [163]

Mr. Robinson: Yes.

Mr. Goldberg: I would like to have the record show if those are carbon copies of the original exchange slips of Lerner Shops during the period from July 1, 1944, to March 31, 1945, with the names and addresses of the customers and segregated among the three communities I have mentioned. I assume those are all, and I know there are at least that many.

Mr. Robinson: Would it be of some interest to show whether or not the amount before Wilfred Lerner opened up and practically threatened you with bankruptcy is more or less since he opened up?

Mr. Goldberg: That can be. I didn't make this examination.

The Court: All right. Are you willing to stipulate to that?

Mr. Robinson: Yes.

Mr. Goldberg: Very well.

The Court: Anything else of this witness?

(Testimony of Milton Silverman.)

Mr. Goldberg: I think not.

The Court: Q. Would you say that store does any greater proportion of out-of-town business than any other normal store in San Francisco?

A. I would say not.

Q. It would be about the same as the general run of good mercantile establishments?

A. Exactly.

Mr. Goldberg: Q. Do you get many customers who do [164] business in other Lerner stores in other parts of the state or the country?

A. Yes.

Mr. Goldberg: That is all.

Mr. Robinson: That is all.

The Court: We will recess until two o'clock this afternoon.

(Thereupon a recess was taken until 2:00 p.m. this date.)

Friday, April 27, 1945, 2:00 p.m.

JESSIE SHELTON,

called for the plaintiff; sworn.

The Clerk: Will you state your name to the Court, please.

A. Jessie Shelton.

Direct Examination

Mr. Goldberg: Q. Mrs. Shelton, what is your occupation?

A. Coat and suit department manager.

(Testimony of Jessie Shelton.)

Q. Coat and what? A. Suit.

Q. Department manager? A. Yes, sir.

Q. For whom do you work?

A. The Lerner Shops.

Q. Where? A. 833 Market Street.

Q. In San Francisco?

A. San Francisco.

Q. How long have you had the position as manager of that department?

A. About six years.

Q. How long have you worked in that store?

A. Going on ten years.

Q. With reference to the time when the store was opened, when did you go to work there?

A. Three days before the store was opened.

Q. And you have been continuously there all that time? A. Yes, sir.

Q. Before you worked in the Market Street store did you work in any other Lerner store?

A. Our Lerner shop in San Diego. [165]

Q. And had you been in the same line of business before that? A. Yes, sir.

Q. By what name is that store referred to by your customers in your hearing?

A. Well, I would say mostly "Lerner's."

Q. Do you know where your customers come from, that is generally where their homes are?

A. Well, just from conversation, where they tell us they are from.

Q. From that can you tell us if you have any customers outside of San Francisco?

(Testimony of Jessie Shelton.)

A. Quite a few.

Q. Can you tell us generally from what areas they come?

A. Well, from all outlying districts.

Q. Would you say in all directions, north and south and east?

A. In the Bay area, all around—Ukiah and all of those districts.

Q. With reference to the area between San Francisco and San Jose, and including San Jose, do you know whether you have any customers in any of that area?

A. Yes, we have.

Q. In what communities?

A. Well, in Palo Alto we have quite a few customers, Redwood City, Burlingame, San Jose.

Q. When you say you have quite a few customers, are those people who have come in and bought on isolated occasions, or is that something happens more or less continuously?

A. I think it is continuously.

Q. Have you had any persons in the store who have mentioned to you a Lerner store in San Jose?

A. Yes, sir. [166]

Q. Can you tell us about when that took place?

A. I would say about four months ago.

Q. What took place at that time?

A. One of the salesgirls we had asked me to talk to the customer, and the customer asked me if we had a store in San Jose, and I told her no. And she said, well, we did have. I told her we didn't have a store there.

(Testimony of Jessie Shelton.)

Q. Where is that salesgirl today, if you know?

A. She is in the store.

Q. What is her name? A. Miss Kelly.

Q. You also have a Mrs. Austin? A. Yes.

Q. Is she in the store today?

A. No, she is out sick today.

Q. Were there any other occasions that have come to your attention of anyone mentioning a Lerner store in San Jose? A. No, sir.

Q. You O.K. checks, do you not?

A. Yes, sir.

Q. I will just ask a leading question to shorten it: You take in a number of checks made out to Lerner's?

Mr. Robinson: We will stipulate——

The Court: I thought we agreed that was the fact.

Mr. Goldberg: I suppose that is true.

Q. These customers who come in from outlying areas, are they people whom you recognize by sight? A. Yes, sir.

Q. Have you any of the same ones who come in repeatedly? [167] A. Quite frequently.

Q. They are regular customers?

A. Yes, sir.

Q. Do people come into the store who have traded in other Lerner stores?

A. From all over the nation.

Q. How frequently does that happen?

A. Every day, I would say.

(Testimony of Jessie Shelton.)

Q. With respect to the type of merchandise that is sold in the Market Street store where you work, do you know what the reputation of that merchandise is with respect to style and price?

Mr. Robinson: Mr. Magee has gone into all that, and, as I have indicated to you, we have nothing against Lerner stores. We think they have a good reputation.

Mr. Goldberg: We admit it is good, but it is the precise reputation that I think we are concerned with.

The Court: Haven't you gone into that with Mr. Magee?

Mr. Goldberg: Speaking of the company generally. I had in mind with respect to this particular store, because it is within her domain a little bit more.

The Court: I suppose counsel will be willing to stipulate that the witness would so testify that it has a good reputation.

Mr. Goldberg: Well, that its reputation is for the latest styles at popular prices.

The Court: Before you know it you are going to have me going in there and buying merchandise.

Mr. Goldberg: I can tell you my wife has. [168]

The Court: That is not an uncommon statement that most good businessmen make in selling merchandise. I do not think you need particularly elaborate on that, Mr. Goldberg. It isn't an element here, is it?

Mr. Goldberg: If the statement I made is ac-

(Testimony of Jessie Shelton.)

cepted as if it were testified to by the witness, I have no no objection, because that is what she told me.

The Court: Will you stipulate to that?

Mr. Robinson: So stipulated.

Mr. Goldberg: No further questions.

Cross Examination

Mr. Robinson: Q. Does your firm do alterations for customers? A. No, sir.

Q. Your firm, of course, does not carry charge or budget accounts? A. No, sir.

Q. Your firm makes no deliveries, is that right?

A. Through the United Parcel.

Q. I mean do you deliver locally in San Francisco? A. Yes, sir.

Q. You make deliveries through the same service that the department stores do? A. Yes, sir.

Q. With regard to sizes, you handle all sizes of merchandise, don't you? A. Yes, sir.

Q. I mean by that over size 20?

A. Well, we handle a few larger sizes. [169]

Q. You do not confine yourself to what is called misses and juniors, do you?

A. We have such a few large sizes.

Q. You do handle large sizes?

A. Yes, sir.

Q. You wouldn't say your business is confined to misses and juniors, as that term is used in the trade?

A. Well, the way we have customers, I wouldn't

(Testimony of Jessie Shelton.)

say we could do very much for the larger-sized woman.

Q. I am asking you what your business is. Is your business confined to misses or juniors? Will you answer Yes or No and explain your answer, if you wish?

A. Well, I would say misses and juniors.

Q. You do handle large sizes, though, don't you?

A. Yes, sir.

Q. So it is not confined to misses and juniors, is it?

A. No, not the way you are putting the question.

Q. You know about the price range in that store, don't you?

A. Yes, sir.

Q. And you also know about the highest price line regulation, don't you?

A. Yes, sir.

Q. And you know what date that went out of effect?

A. Well, I wouldn't want to say for a fact.

Mr. Robinson: I will state to Mr. Goldberg that Mr. Lerner ascertained by telephone during the noon hour that the date that it was abrogated was as of June 30, 1944.

Mr. Goldberg: I haven't any objection to that, but I do [170] not know that that is determinative of when it became public knowledge that the price line restriction was going out of effect. My understanding is it is based on the statute, and the statute was under consideration for some time before it was finally adopted.

(Testimony of Jessie Shelton.)

Mr. Robinson: It is not based on any statute; it is an OPA regulation.

Mr. Goldberg: It is an OPA regulation obtained on the passage of the statute extending the OPA administration, and that was one of the conditions of its passage, that the price line restriction be eliminated, that the limitation be eliminated.

Mr. Robinson: It went off on June 30. The point is these people——

The Court: Let us not argue about it. If it becomes important you can furnish me with that date.

Mr. Robinson: Are you satisfied to accept that date as the date on which it was abrogated?

Mr. Goldberg: That is the date as of which the statute went into effect.

Mr. Robinson: The highest price line was abrogated, I think, on that day, wasn't it?

Mr. Goldberg: That is my understanding. I mean, it is not determinative of when it became public knowledge.

The Court: Any further questions of this lady?

Mr. Robinson: Q. Can you give me your price ranges as they were prior to the abrogation of the highest price line rule?

A. I don't get your question.

Q. Pardon? A. I don't get your question.

The Court: This lady was not examined about that, and that is a field that has already been covered. Are you going to go over it again?

Mr. Robinson: I expected Mr. Silverman back on that. I thought he would bring the book with him. Have you the book?

(Testimony of Jessie Shelton.)

The Court: This lady doesn't know about prices.

Mr. Goldberg: I have the book right here.

Mr. Robinson: I understand Mr. Silverman would be back with the book.

Mr. Goldberg: You did not ask him to come back; you asked for the book, so I brought the book.

Mr. Robinson: I was not so specific. That is quite right.

The Court: I do not see the materiality of it, and if you pursue this line I am going to hold it is incompetent and irrelevant and shut off examination on that line. I do not see the pertinency of it to this matter.

Hr. Robinson: I might explain the object of this, and then your Honor can dispose of it as your Honor sees fit.

The Court: You have made your point and I have made the ruling. Now let us go on to something else.

Mr. Robinson: That is all. [172]

Redirect Examination

Mr. Goldberg: Q. Mrs. Shelton, when the store makes deliveries for a customer, who pays for the cost of delivery? A. The customer.

Q. But if the customer comes in and takes the package under his arm, you do not have any delivery charge? A. No.

Q. Do you know how the prices in Lerner's store on Market Street compare, the same items of merchandise, with prices in other stores in that area?

The Court: Haven't you covered that, Mr. Gold-

(Testimony of Jessie Shelton.)

berg, with the testimony of the manager of the store?

Mr. Goldberg: If it will be stipulated that this witness would testify to the same effect, I wouldn't have any objection to it.

The Court: I do not see that it helps the Court any, because the manager of the store, who presumably is fully acquainted with the policy and business of the store, has testified to it. Now, are you going to bring in every saleslady in the store to corroborate him?

Mr. Goldberg: No.

The Court: Then I do not see any point to it.

Mr. Goldberg: That is all.

The Court: That is all.

MRS. ANN DAVIS

called for the plaintiff; sworn.

The Clerk: Will you state your name to the Court, please. A. Mrs. Ann Davis.

Direct Examination

Mr. Goldberg: Q. Mrs. Davis, you are in the employ of the Lerner store on Market Street?

A. Yes, sir.

Q. You have been in the employ of that store for about six years. A. Yes, sir.

Q. With an interval of a short period when you were out of the store until November of 1944?

(Testimony of Mrs. Ann Davis.)

A. Yes, sir.

Q. You are manager of the dress department?

A. Yes, sir.

Q. Have you had any occasion where any customer mentioned to you the existence of a Lerner store in San Jose? A. A couple of times.

Q. Can you tell us about when those were, as well as you can recall, approximately?

A. Well, it was either just a little before Christmas or around Christmas time.

Q. Was that an occasion, or was that one of those occasions that was called to you attention by one of the salesladies?

A. Yes, that was an occasion when I O.K.'d a check. The customer said she was from down around San Jose, and did all her shopping——

Mr. Robinson: I didn't hear that.

The Witness: It was one of the customers, when I was called to O.K. her check—they usually get rather friendly—she said, “Oh, yes, I am from down San Jose,” and she usually went down to Lerner's to shop quite frequently.

Mr. Goldberg: Q. Was she the one who mentioned the Lerner store in San Jose, or are you speaking of some other occasion?

A. Well, I couldn't put my finger down on that.

Q. As to whether that was the woman.

A. No.

Q. Who was the saleslady who mentioned that to you? A. That was Miss Austin.

Q. Except for this instance you mentioned, do

(Testimony of Mrs. Ann Davis.)

you know where your customers come from, those that you meet in the store.

A. Well, the come from all over.

Mr. Robinson: I will stipulate that her testimony would be the same.

Mr. Goldberg: As that of Mrs. Shelton?

Mr. Robinson: As that of the previous witness.

Mr. Goldberg: I think if counsel will make that stipulation extend to the balance of Mrs. Shelton's testimony, and ask that apply generally, I will have no further questions.

The Court: Do you want to bring out anything different from what the other witness testified to?

Mr. Goldberg: No.

The Court: He said she would testify the same as the previous witness.

Mr. Goldberg: What I meant was not only with respect to that one question but generally.

The Court: I understood counsel to say he would be willing to stipulate she would testify the same as the other witness who testified. That is, it would cover the same ground.

Mr. Goldberg: That is satisfactory. No further questions.

The Court: Have you any questions of this witness?

Mr. Robinson: No questions.

Mr. Goldberg: I have no further questions.

Mrs. Calder.

The Court: Is this a witness along the same line or something different?

Mr. Goldberg: Yes, her testimony would bear—

Mr. Robinson: Tell us who she is and how long she has been in the store.

The Court: Just state her name.

Mr. Goldberg: Mrs. N. A. Calder. She is in charge of the dress department fitting room in the store in charge of the dress department. She has been with the store since it opened on Market Street. That is the store she works in. She will testify with respect to checks being made out to Lerner's to customers referring to the store as Lerner's, that customers live in Redwood City, San Jose and other Peninsula towns; that would be her testimony.

The Court: Do you stipulate to that?

Mr. Robinson: So stipulated.

Mr. Goldberg: Mrs. Reynolds.

The Court: Is this another witness to the same effect?

Mr. Goldberg: No, with respect to the testimony of this witness—

The Court: Call her.

MRS. BETTY REYNOLDS

called for the plaintiff; sworn.

The Clerk: Q. Will you state your name to the Court, please? A. Mrs. Betty Reynolds.

Mr. Goldberg: I will be glad to show to Mr. Robinson a report made by Mrs. Reynolds which

(Testimony of Mrs. Betty Reynolds.)

covers the testimony that I would elicit from her. I will say generally it consists of the result of a survey made by Mrs. Reynolds outside of the Lerner Store on Market Street inquiring of the various people coming in or out or standing by the windows as by the name which they know the store, some of whom volunteer the place they come from and the stores of the company they know in other areas. This was conducted in a period of a couple of hours in the middle of the day, and the witness's testimony, as I understand it, would be the same as her report. So if counsel has no objection to it, I will be glad to read the report. That does not preclude counsel, of course, from cross-examining the witness.

The Court: Is there any objection to the testimony going in in the form of that report?

Mr. Robinson: I will go you even one better. You can read it into the record, or offer it into the record, and I won't ask any questions, and you can excuse Mrs. Reynolds.

The Court: You are excused, madam.

Mr. Goldberg: So that it may be in the record I will read it, if the Court please.

The Court: You might just have it marked in evidence. I will read it and then it will save you the time while you are getting some other witnesses.

(The document was marked Plaintiff's Exhibit 8 and appears in words and figures as follows:)

“Re: Lerner Shops,
831 Market St.,
San Francisco, Calif.

The following is the verbatim report of our Mrs. Betty R. Reynolds, covering questioning of customers of the above shop on April 25, 1945 between 11:45 a. m. and 2 p. m.:

‘I contacted women entering, leaving or window shopping at Lerner’s and asked them, ‘Would you mind telling me, when you talk about this store to a friend, what you call it?’

Out of fifty nine (59) women chosen at random, fifty seven (57) spoke of the store as ‘Lerner’s’ two called it ‘Lerner’s Shop’.

One woman stated that the word ‘Lerner’s spells good value, popular prices and a nice variety of merchandise. Another woman said that ‘Lerner’s was known throughout the United States as ‘Lerner’s’. A woman from Santa Barbara said that she had never known it in any other way than ‘Lerner’s’. A woman from Stockton said that people there just say ‘Lerner’s’ to designate the store and never speak of it by any other name. Two Spanish speaking young girls said they do all their shopping at ‘Lerner’s’.

I asked a man standing outside by what name he knew the store. He said he knew it only as ‘Lerner’s’; that he liked his wife to shop there if he was going to meet her after shopping because it was an

(Testimony of Mrs. Betty Reynolds.)

easy name to remember and that his wife had shopped there for years.

Two young school girls, wearing their hair in braids down their backs, always meet at 'Lerner's' after school.

A woman who said she was from New Orleans said that 'Lerner's' have pre-style and are just one month behind New York in their style and material. She said there is a 'Lerner's' in New Orleans.

Another woman from Honolulu said that when women are coming to the mainland, they are advised to shop at Lerner's by other women who have been here before.

Another woman said that she calls it the 'smart shop' and her friends all know that she means 'Lerner's'.

Two Chinese school girls call it 'Lerner's'.
4/25/45"

Mr. Goldberg: I have two other witnesses, store managers, who have not arrived yet, but in view of the way the stipulations have been made it may be that counsel will stipulate to their testimony. The first witness is Mrs. Elert.

Mr. Robinson: What is the difference?

Mr. Goldberg: She is the manager of the Lerner store on Grant Avenue and has been there for quite a long time. She would testify that she has customers from all of the various areas, including San Jose and Peninsula towns as well as larger outlying

areas, and that she has seen checks that have come in as well as return slips, and that customers know the store as Lerner's; that she has had several instances of persons coming in who have referred to the Lerner store in San Jose as being the company's new store, and in the case of one of them, insisted that it was because she could read the sign and she knew it was the Lerner store, although the manager told her it was not. That in substance would be the testimony of Mrs. Elert.

Mr. Robinson: So stipulated.

Mr. Goldberg: The other witness is Miss Kane. She is the manager of the Lerner store in Oakland at Twelfth and Washington Streets. She has been the manager of that store only since about June of 1944, but she managed a store of the company in Pennsylvania for about eight years, is familiar with the fact that she has a lot of customers who come in from outlying areas, including San Jose and the Peninsula towns and, having checked with her money and these exchange slips, she has checks from people who make the checks out to Lerner's, the customers refer to the store as Lerner's, and she has had several instances of customers who have told her about the opening of Lerner's store in San Jose as one of the stores of the company, and she also would testify that she has many people coming into the store who have been customers in other Lerner stores in various parts of the country, the East, the South and the Middlewest.

Mr. Robinson: That would include L. G. Lerner & Company, too, wouldn't it?

Mr. Goldberg: Not to my knowledge.

Mr. Robinson: They are in the Middlewest. How would you know? I will so stipulate. You may have to have my amendment to part of it later.

Mr. Goldberg: She would also testify that one of her means of knowing where her customers are is she takes in deposits on lay-away plan and then she gets the name and address.

My next witness is Mr. Wilfred Lerner.

Mr. Robinson: Is this your last witness?

Mr. Goldberg: I hope.

WILFRED LERNER,

called for the plaintiff; sworn.

The Clerk: State your name to the Court, please.

A. Wilfred Lerner.

Direct Examination

By Mr. Goldberg:

Q. You are the defendant in this action, Mr. Lerner? A. I am.

Q. You have a retail store for the sale of women's wearing apparel in San Jose, have you not?

A. Misses' and juniors' wearing apparel is all we handle. We don't handle any women's wearing apparel.

Q. That is at 70 South First Street?

A. That is right.

Q. You opened that store on June 1, 1944?

(Testimony of Wilfred Lerner.)

A. That is right.

Q. You also now reside in San Jose, do you not?

A. That is right.

Q. Prior to June, 1944, you had lived in Palo Alto for eight or nine years?

A. That is right.

Q. Prior to June 1, 1944, you had never been in the retail business anywhere, had you?

A. That is right.

Q. And prior to that date you had never had a place of business in San Jose?

A. That is also right.

Q. Prior to June 1, 1944, you knew of the stores of the plaintiff, did you not?

A. I knew they existed, yes.

Q. You had been in one or more of them, had you not? A. Yes. [182]

Q. You had seen them in New York City?

A. Yes, sir.

Q. And in San Francisco? A. Yes, sir.

Q. In Oakland? A. Yes, sir.

Q. Your store in San Jose—Let me ask you this first: When you opened your store you put a sign across the top carrying the name "Lerner's," did you not? A. That is right.

Q. The picture I hand you is a fair representation of the sign, is it not?

A. The original sign. It is.

Mr. Robinson: Read it in the record, please, what it says.

(Testimony of Wilfred Lerner.)

The Court: Do you wish to offer that in evidence?

Mr. Goldberg: Yes, I am going to offer it in evidence.

The Court: Let it be marked in evidence.

Mr. Goldberg: I assume that your Honor saw it during the pre-trial conference.

(The photograph was marked Plaintiff's Exhibit 9.)

Mr. Goldberg: Q. In addition to the sign with the word "Lerner's" in script across the face of the sign, the word "Apparel" in smaller block letters above "Lerner's" in the right-hand corner, you had the name "Lerner's" on the windows, did you not?

A. That is right.

Q. And the picture I show you of one of the windows is a correct representation of how the name appeared, is it not?

A. It is an exact duplicate of the sign.

Mr. Goldberg: I will offer that in evidence.

(The photograph was marked Plaintiff's Exhibit 10.) [183]

Mr. Robinson: Which one is that?

Mr. Goldberg: The window sign.

Mr. Robinson: I do not know that I have seen that.

Mr. Goldberg: There are two such windows in your store?

The Witness: That is right.

(Testimony of Wilfred Lerner.)

Mr. Goldberg: And the name "Lerner's" was on each of those windows?

The Witness: That is right.

Mr. Robinson: I have never seen those, Mr. Goldberg. These have been touched up, haven't they?

Mr. Goldberg: Not that I know of.

Mr. Robinson: The word "Lerner's" has been obviously touched up.

Mr. Goldberg: I think if you want to testify to that, you might, but I think the statement ought to be withdrawn until you can make such a statement under oath.

Mr. Robinson: That is inked to bring it out. You can see it yourself.

Mr. Goldberg: I can't feel it.

Mr. Robinson: I will object to it unless you bring the photographer here who took the picture to testify that the word "Lerner's" there has not been accentuated by being outlined in ink.

Mr. Goldberg: The witness has identified the picture and it is in evidence, and counsel wants to argue the matter. [184]

Mr. Robinson: Will you ask him, then, if it is a correct representation?

Mr. Goldberg: If your Honor will run a finger over it you will notice there is nothing over it at all, whereas here is one that was inked, which was furnished to us by counsel, and you can tell when you run your finger over the added portion at the top, you can tell it is inked.

(Testimony of Wilfred Lerner.)

The Court: I remember this last photograph you furnished me was one which was produced to show the change that was made.

Mr. Goldberg: That was patently inked, but the picture I have handed to your Honor is not, and if counsel can show on cross-examination or by other witnesses that there is anything wrong with it, I am satisfied; otherwise it is all right.

Mr. Robinson: If it is not, I am very much surprised.

The Court: I do not see that it is of any great importance one way or the other.

Mr. Robinson: I will withdraw it. Mr. Goldberg says it is not inked.

Mr. Goldberg: I have two more that look just like it. I am sure we were not doing any touching up.

Mr. Robinson: The point is when you take those pictures those lines don't show up, and it would be perfectly proper to ink them in if you so desired. I will withdraw that remark. I did not mean to intimate that Mr. Goldberg was touching up pictures. I merely mean if they were inked to bring anything [185] out, that fact should be stated, and it would be perfectly proper to do that, of course. I will show you the reason why I thought it was inked.

The Court: No, I think there is some shadow over a part of it that makes it a different color from the other.

Mr. Robinson: Here is the reason why I thought

(Testimony of Wilfred Lerner.)

it was inked. While it is smaller, at a greater distance you can hardly see it. It is gold letters.

Mr. Goldberg: Look how easily you can see it.

Mr. Robinson: My remarks were based upon my own picture. Now I see undoubtedly there is a black outline on it.

Mr. Goldberg: Q. Mr. Lerner, prior to opening your store in San Jose you ran certain ads in the San Jose newspapers, did you not?

A. You mean when we were getting ready to open?

Q. Prior to the opening.

A. Prior to the opening, yes.

Q. And subsequent to that time?

A. Yes, we are still advertising.

Q. You are familiar with those advertisements which are attached to the complaint in this action?

A. Yes, fairly so. Some of them are about a year old.

Q. You have seen them? A. Yes, I have.

Q. And those are correct representations of the ads that you did run? A. That is right.

Q. In connection with your business you also used sales tags? [186] A. That is right.

Q. Is this a correct representation of the sales tags that you used? A. That is right.

Q. And still use? A. Yes.

Mr. Goldberg: We will offer this in evidence for the form. I don't care about the written material.

(The sales tag was marked Plaintiff's Exhibit 11.)

No. EX-111

Pls. Exhibit No. 11

Filed 4/27/45

C. W. Culbreth, Clerk

By

R. E. Woodward
Deputy Clerk

PLEASE RETAIN THIS CHECK

All purchases should give complete and entire satisfaction in every respect.

This check must accompany purchase for exchange. Merchandise will not be accepted for return or exchange after SIX DAYS from the date of purchase.

Lerner's

70 SOUTH FIRST STREET

SAN JOSE

AMERICAN-ALLIED CO. BUREAU FOR BUSINESS

PLAINTIFF'S EXHIBIT NO. 11.

235

Lerner's

"Youthful Apparel"

Phone Ballard 6307

70 South First Street

SAN JOSE, CALIFORNIA

Date July 29 1944

Name

A. Adams

PHONE NUMBER

250-19

AMT. REC'D.

Frank Spencer
July 29 1944

Garment Sale	5.50
United States Circuit Court of Appeals FOR THE NINTH CIRCUIT	
TOTAL	5.50
State Sales Tax	17
Alteration	
TOTAL	5.67
Deposit	
BAL. DUE	

PAUL P. O'BRIEN,

CLERK

CLERK

S. Silver

(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. In your business you also use bags in which to contain parcels that you sell?

A. Sweaters and blouses all go in bags.

Q. And on those bags you have a name?

A. That is right.

Q. Is this one of the bags that you used when you opened your business?

A. That is one of the bags we originally used. that is right.

Q. What kind of a bag do you use now?

A. We use the same bag as this, except we have labels that we paste on top of it that says "Wilfred Lerner," the same as the sign outside.

Q. Is that label as large or larger—

A. You have a sample of my box. It is the same cut as the box. I don't know whether you have or not.

Q. No, I have not.

A. It is approximately the "Lerner's"—well, it is the same proportion as the sign, because everything was made from a drawing, blown up or reduced for the cuts, and the "Lerner's" in that is a trifle smaller than it is there, just a fraction, so that it takes approximately the same area. [187]

Mr. Goldberg: I will offer the bag in evidence as Plaintiff's next exhibit.

(The bag was marked Plaintiff's Exhibit 12.)

*From W. Alfred for
San Jose.*

No. 23462-G
P/S. Exhibit No. 12
Filed 4/27/45
C. W. Callreuth, Clerk
By R. E. Woodward

APR 27 1945
UNITED STATES DISTRICT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN - 7 1946

PAUL P. O'BRIEN!
CLERK

Lerner's

70 S. FIRST ST., SAN JOSE

(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. When was it that you started to put a sticker over the name "Lerner's" on your bags?

A. Well, just as soon as we could get the stickers from the printers we started using them, both on the bags and on the boxes. We started that shortly after we got into litigation. We didn't want any litigation. We tried to——

Q. You can answer my question.

The Court: It has already been answered. He said, "shortly after the litigation started."

The Witness: The exact date I couldn't tell you.

Mr. Goldberg: Q. The complaint was filed in September, was it, in September?

A. The complaint was filed in September? No, it was before that, I believe, because my recollection is it was some time in July when we first started becoming involved with your business.

Q. That is right.

A. It was shortly after we ordered the sign changed, the new cuts made. The exact dates I couldn't give you. As quickly as I could get the cuts made and the labels printed we started using them.

Q. You said you ordered the sign changed. Are you speaking of the sign at the top of the store?

The Court: Is there any dispute about this? When was [188] this done? Was this a result of the pre-trial conference?

(Testimony of Wilfred Lerner.)

Mr. Goldberg: Part of it was the result of pre-trial, and part of it——

The Court: It had taken place before?

Mr. Robinson: It had taken place before—just a moment, I am not sure of that. I think at the pre-trial, yes, it had already been ordered. I can't be sure about that.

The Court: If you can't help on that we will let the witness testify.

Mr. Goldberg: Q. You were still using the tag with the name "Lerner's" on it, the sales tag, when this was made out on August 30th?

A. What are you referring to? I didn't get your question.

Q. The sales tag with the name "Lerner."

A. The sales tag?

Q. Yes.

A. The sales tag took four to six months to get printed. We are still using them today.

Q. These stickers that you were talking about, on which you put the name "Wilfred," did you use those also on your mailing envelopes and boxes?

A. No, not these stickers.

Q. I will ask you if this is an envelope that you sent out to your counsel?

A. This is a sticker that was only used for mailing. This is not the sticker I referred to that went on the bag. This does not go on those bags. That is not the sticker I refer to on the bags. The other sticker is about that—well, say three by six or three and a half by six [189] inches, maybe even larger.

(Testimony of Wilfred Lerner.)

Q. This sticker with the name "Lerner's" only, the original one, you were still using on October 13, 1944, were you not?

Mr. Robinson: To whom was that addressed?

Mr. Goldberg: To you.

Mr. Robinson: Henry Robinson?

Mr. Goldberg: That is right.

Mr. Robinson: I am not a customer of his store or yours. I do not wear useful feminine apparel.

Mr. Goldberg: Q. Is that correct?

A. That was used on that package, yes.

Mr. Goldberg: I will offer this in evidence as plaintiff's next exhibit.

(The sticker was marked Plaintiff's Exhibit 13 in evidence.)

(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. Can you tell us when it was that you changed the sign at the top of the entrance for your store?

A. Which change?

Q. Well, what changes did you make?

A. Well, we immediately upon hearing from you, your first letter——

Mr. Robinson: That letter was dated, Mr. Goldberg, the letter of Mr. Steinhart was dated July 12th, I believe, so we might as well give the witness that date so he can tie the incident to it, if you have no objection.

Mr. Goldberg: I have no objection.

The Witness: Immediately upon hearing from Mr. Steinhart— [190] I don't want to mention the date, because I am not sure of it——

Mr. Robinson: I think it was July 12th, wasn't it?

Mr. Goldberg: That is the date of the letter. The 12th or the 13th.

The Witness: Well, we got it a couple of days later. I ordered the sign man to make an addition to our large sign outside, "Home Owned." We put signs in the window and signs in the store. There was a sign in the window that read something to the effect that this was a home owned store, not connected with any other store. There was a sign inside the store that read, "This is a home-owned store." Later we made additional changes in the sign.

Q. When was the change made?

(Testimony of Wilfred Lerner.)

A. Well, when they had the pre-trial conference—I think Mr. Ladar and Mr. Robinson—we added the name, “Wilfred” to the sign on top. That was ordered some time in the latter part of last year but didn’t get finished until this year.

Q. It did not get finished until about two or three weeks ago, did it?

A. That is right. That is no fault of mine. The sign man couldn’t get it done any sooner.

Q. Is this a correct representation of that sign?

A. As it is today, yes.

Q. As it appears today?

A. And the change was made also on the glass.

The Court: Are these offered in evidence, Mr. Goldberg? [191]

Mr. Goldberg: Yes, I want to offer that in evidence.

(Photograph was marked Plaintiff’s Exhibit 14 in evidence.)

The Witness: The gold leaf change on the glass was made considerably sooner than the sign up above, because that only entailed one man, where the other brought into being two or three companies that were involved in changing the upper sign.

Mr. Goldberg: Q. When would you say the change on the windows was made?

A. I believe it was the latter part of last year. The exact date I wouldn’t attempt to say.

Q. Is this a correct representation of that lettering as changed? A. That is right.

(Testimony of Wilfred Lerner.)

(Photograph was marked Plaintiff's Exhibit 15 in evidence.)

Mr. Goldberg: Q. Now, I will show you five additional photographs and ask you if in each of those the sign as it now appears on your store appears in the picture? A. Yes.

Mr. Robinson: Was the photographer lying flat on his back when he took them?

Mr. Goldberg: He took them, or so I assume, in various positions, in which anyone approaching the store on the street would see it.

The Court: How many pictures are there?

Mr. Goldberg: Five.

The Court: Do you wish to offer them as one exhibit?

Mr. Goldberg: Well, I think it would probably be better if they were offered separately. I do not know that we will refer [192] to any of them specifically, but I think it would be better if they were numbered separately.

(Photographs were marked Plaintiff's Exhibits 16-A to 16-E, inclusive, in evidence.)

Mr. Goldberg: Q. I will ask you if this picture is a correct representation of the floor between your windows entering your store as it exists?

A. Yes, that is a picture of the entranceway.

Q. As it exists today? A. That is right.

Mr. Goldberg: We offer that in evidence and ask that it be marked Plaintiff's next exhibit.

(Photograph was marked Plaintiff's Exhibit 17 in evidence.)

(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. Did you make any change in your advertisements, as to how your name appeared on them?

A. I did. I think if you will refer to the scrapbook Mr. Robinson has, you can get the dates from that.

Q. That was approximately in November, 1944?

A. I couldn't state the date. Everything is stated in there.

Q. I mention it, because I recall it on your last deposition.

The Witness: I believe they are all in order, the dates following.

Mr. Robinson: The words "Home owned" first appear in an ad of August 18, 1944, and then "Home owned" appears consistently thereafter. The word "Wilfred" appears for the first time Sunday, November 26, 1944, and appears thereafter. [193]

Mr. Goldberg: And the elimination of the apostrophe "s" on "Lerner's" appears for the first time December 3, 1944.

Mr. Robinson: That is right, the very next day. November 26th had the apostrophe "s" and then December 3rd the apostrophe apparently was cut right out of the same cut.

The Witness: That is exactly what happened.

Mr. Goldberg: Q. On all your ads until Sunday, January 28th, you also, in addition to your name, first as "Lerner's," and then as "Wilfred Lerner," had a little cut with the words "The Shop With You In Mind?"

(Testimony of Wilfred Lerner.)

A. That is right. Do you want that explained?

Q. If you think it needs explanation, that is satisfactory.

Mr. Robinson: Will you explain, Mr. Lerner, while I am looking at that?

The Court: Let counsel finish his direct examination first.

Mr. Goldberg: Q. I will show you a tear sheet dated April 22, 1945, from the San Jose "Mercury-Herald and News," which I believe was the last issue in which you inserted an ad, is that correct?

A. Last Sunday was the ad I had—was that last Sunday's paper, April 22nd?

The Court: April 22nd was last Sunday.

The Witness: Yes, that was the last one.

Mr. Goldberg: Q. And this is a correct copy of your ad that day, is it not?

A. That is right.

Mr. Goldberg: I will offer that in evidence as Plaintiff's [194] next exhibit.

(Tear sheet referred to marked Plaintiff's Exhibit 18 in evidence.)

Hits from the Easter Parade

Short Coats
Tunic Coats
Mandarin
Coats

100% VIRGIN WOOL

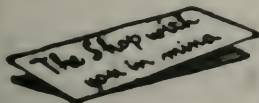
Gold — Beige — Blue — Aqua —
Lime—American Beauty

\$29⁹⁵

Trim
Tailored
Suits
from
\$25⁰⁰



for your convenience
Budget Terms
at no extra cost



Whitfield
Lerner

70 S. FIRST ST., SAN JOSE

HOME OWNED

PLAINTIFF'S EXHIBIT NO.18.



No. 11347
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

JUL 1 - 1946

PAUL P. O'BRIEN,

CLERK

Navy or green rayon
crepe with flower
motif. Sizes A12 to
A20.

No. 23662-G

P/G. Exhibit No. 18

Filed 4/27/45

C. W. Calbrouth, Clerk

By *E. E. [Signature]*
Deputy Clerk

(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. Mr. Lerner, can you tell us what items of merchandise you handle in your store?

A. Yes. Coats, suits, dresses, sweaters, blouses, slacks, slack suits, jackets and skirts.

Q. Do you have hosiery? A. No.

Q. Underwear? A. No.

Q. Girdles? A. No lingerie.

Q. None of the so-called small wears?

A. No purses, no hats.

Q. Can you give us your price range, that is, the low and the high prices of those items?

A. Well, they vary from time to time. Right now they are approximately, in coats, from \$25 to approximately \$129.95. All of those prices, of course, on the fur-trimmed goods, have tax extra. That would mean 20 per cent higher than the price I quoted you on the tax.

Q. That is on coats that are fur-trimmed?

A. Coats that are fur-trimmed. On suits we have suits from \$25 to \$49.95. On dresses, from \$8—no, we just got in some at prices from \$7.95 to \$20.95. Our normal price on dresses is \$8.95 to \$20.95. Sometimes we have a few higher.

On jackets, they run from \$9.95 to, I believe, \$12.50 or \$12.95. I don't know exactly which price it is there. It is \$12.50 or \$12.95. [195]

Skirts are from \$6.95 to, I think, around \$9.95. I wouldn't want to state exactly on the top price. But nothing lower than \$6.95.

Sweaters starting at \$4.95 to \$8.95, I believe. What have I left out?

(Testimony of Wilfred Lerner.)

Q. Have you given me the slack suits?

A. Slack suits from \$8.95 to \$19.95. Separate slacks from \$5.95 to, I believe it is, \$9.95. Did I give you blouses?

Q. I don't think you did.

A. Blouses from \$2.95 to \$6.95.

Q. When you say that you now sell coats from \$25 up to your top range, do you have a separate range for untrimmed coats, do you know?

A. When I said \$25, that is your untrimmed coats.

Q. What is the top range on your untrimmed coats? A. I think at present \$39.95.

Q. And then on the fur-trimmed coats, what is your range?

A. \$55 is the lowest cost we have on fur-trimmed coats.

Q. The fact is—— A. That means plus tax.

Q. The fact is, however, is it not, that on a number of occasions since you have opened your store you have advertised untrimmed coats at \$19.95, have you not?

A. We have had coats at different prices, yes. We have reduced coats and advertised them for \$19.95.

Q. Haven't you had coats at the regular price of \$19.95? A. Not a reduction, no.

Q. In those ads you did not state it was a reduction, did you? [196]

A. It is not necessary to.

(Testimony of Wilfred Lerner.)

Q. You have advertised new coats at \$19.95, haven't you? A. They weren't second hand.

Mr. Robinson: Will you show me what ads you are referring to?

Mr. Goldberg: I am trying to simplify it.

Q. I do not find your ad on coats. Now, what about suits, on which you say your range is from \$25 to \$49.95? A. That is right.

Q. You do sell suits also at \$19.95, do you not?

A. We have suits that have been reduced that we do sell at \$19.95.

Q. Haven't you frequently advertised new suits at \$19.95?

A. That is right, we sometimes make reductions when merchandise first comes in.

Q. I call your attention to an ad in your scrap book dated August 4, 1944, reading, "New suits, 100 per cent virgin wool, \$19.95 to \$45," and at the top of the ad are "Plan now for fall." That is one of your ads, isn't it?

A. That is right.

Q. Were you reducing fall suits in August?

A. That is right. It is possible. I don't know in that particular case. The one you are referring to, \$19.95, undoubtedly was, so it might have been some merchandise—I have had merchandise sent to me that was not ordered, and we do not like to return anything in these days because it is hard to get. Sometimes it is below our standards and we reduce it the minute it comes in. [197]

Q. On Sunday, August 13, 1944, you advertised

(Testimony of Wilfred Lerner.)

as follows: "Plan now for fall. New fall suits \$19.95 to \$45." That is correct, isn't it?

A. Yes, that is correct.

Q. Was that also a reduced price?

A. No, it is most likely the same suits. It is a reduced price, yes, but most likely the same suits.

Mr. Robinson: The same ad?

Mr. Goldberg: No, it is not the same ad. It is nine days later.

The Witness: I think I still have some down there. I haven't got rid of them all yet.

Mr. Goldberg: Q. On Sunday, October 4, 1944, under an ad entitled, "Headquarters for suits, Cardigans, Classics, Dressmakers, 100 per cent virgin wool, suits that suit, \$19.95 to \$45." That was your ad, wasn't it?

A. Yes, sir. I just got through telling you I have those same suits. I have been in business eleven months and we still have some of them left. So my psychology in reducing them in the beginning was right. We haven't cleared them out yet. There was about a dozen pieces altogether.

Q. So these suits you advertised in October as Cardigans, Classics and Dressmakers are the same as the suits you advertised back in August as the new fall suits? A. The \$19.95 suits, yes.

Q. On November 12, 1944— [198]

Mr. Robinson: Mr. Goldberg, I do not know what your object is. I just took a look at Mr. Silverman's testimony, and according to him suits begin at \$6.95. So it would not make any difference

(Testimony of Wilfred Lerner.)

whether he began at \$19.95. The principle would still be the same. He is in the higher price range than you, the general proposition.

Mr. Goldberg: Are we to argue that?

The Court: I do not see what prices have to do with the issues.

Mr. Goldberg: I think it means this: Our suits run about the prices testified, and we say these people sell merchandise within the same price range as ours.

The Court: Let us grant that they do. What difference does it make?

Mr. Goldberg: Then it proves we are trying to sell the same merchandise at the same price.

The Court: So perhaps are hundreds or thousands of other people. I do not see the relevancy of it.

Mr. Goldberg: I think this is true, isn't it? If they sold something that we never sold or never attempted to sell, it could well be argued there was no competition. This is a part of our case to prove that there is competition.

Mr. Robinson: We will stipulate to that.

The Court: I think you gentlemen have this situation: You would hardly say a man selling \$16.95 dresses in Seattle was [199] in competition with a man selling the same priced dresses in Los Angeles. The mere fact that the dresses are in the same price range does not mean there is competition.

(Testimony of Wilfred Lerner.)

Mr. Goldberg: That is perfectly true. I am not asking to introduce this evidence to prove our case, but to prove one part of our case.

Mr. Robinson: Are you willing to make this stipulation, which we found to be the fact from your taking of Mr. Lerner's deposition, that we overlap unquestionably, but our top lines are higher than your top lines, and your bottom lines are down lower than our bottom lines; we overlap in the middle.

Mr. Goldberg: There is no question about that. That is correct.

The Court: Will that cover what you are getting at?

Mr. Goldberg: Well, as far as this witness' testimony is concerned, I think he is departing from the facts as shown by his own records in that he is making the bottom of his price line on suits and coats higher than it actually is, and the higher it is, the less there might be competition, and the lower it is, the more competition.

Mr. Robinson: He told you he had a dozen items at that price.

Mr. Goldberg: I am coming to more than that.

The Court: What you are trying to prove by this witness is that while the price range is different, you think this [200] witness is exaggerating his price range, is that it?

Mr. Goldberg: I think he is exaggerating the difference between our price range and his. In other words, by his testimony he is **pulling in a lit-**

(Testimony of Wilfred Lerner.)

the bit further away from the middle, you might say.

The Court: You are trying to bring out now that this witness is exaggerating his price range?

Mr. Goldberg: That is right.

Mr. Robinson: I might also point out, your Honor, there has been no testimony here as to what Lerner's price range was in June of 1944, when Mr. Lerner opened his store. As to that there is absolutely no evidence. They are giving us testimony as of today only that Mr. Silverman knew, he admitted the prices were lower. So until we have something with which to compare——

Mr. Goldberg: We have the base period book here and it shows those ceilings.

Mr. Robinson: You mean the ones that I tried to get from Mr. Silverman?

Mr. Goldberg: Not that you tried to get. You asked about it. You asked for the book and we offered the book.

Mr. Robinson: Have you your highest price range here?

Mr. Goldberg: Yes.

Mr. Robinson: Will you read those in?

Mr. Goldberg: May I finish with the scrapbook first?

The Court: I hope you gentlemen will not take too long [201] at it, because it does not seem to me to have a great deal of bearing on the matter.

Mr. Goldberg: Q. Mr. Lerner, isn't it a fact that in addition to all the ads I have already called

(Testimony of Wilfred Lerner.)

to your attention, that again on November 26th, on December 3rd and on December 10th you were advertising suits at \$19.95?

A. That is right, and we still have some of those same suits in the store today. I will bring you right up to date—the same suits.

Q. Isn't it also a fact that you were advertising, and on many occasions, fur-trimmed coats at \$49.95?

A. I believe he will find one ad in there at \$45 plus tax.

Q. Will you answer my question?

A. Yes, sir.

Q. The answer to my question is yes, is it not?

A. That is right.

Mr. Robinson: Just a moment. We have the book there.

Mr. Goldberg: I am trying to shorten it at his Honor's request.

Mr. Robinson: You went through it on the deposition. You had no difficulty. "Many" is a variable term.

Mr. Goldberg: I guess I can't please counsel and try to expedite this thing.

Mr. Robinson: If they are in that book they are our ads. There is no doubt about it.

Mr. Goldberg: I refer to the ad, "New Luxurious Fur Coats \$49.95 to \$110 plus tax," on August 4, 1944. Again on September [202] 15, 1944, "Your new fall coats should have full luxurious furs, fine fabrics, masterfully executed, \$49 to \$110."

(Testimony of Wilfred Lerner.)

Mr. Robinson: I think it would help the court if you would prepare a schedule.

The Court: I am not going to need any schedule.

Mr. Goldberg: Again on October 22, 1944, again on November 5, 1944—these are the ads of fur trimmed coats at \$49.95—again on December 10, 1944.

Mr. Robinson: All right. I will stipulate his low price range was \$49.95. Your price is \$24.95. So what is the difference? \$49.95 is so far from \$24.95.

Mr. Goldberg: At counsel's request we have brought in here a book of the plaintiff entitled, "Base period prices for this store," and the second sheet has the following under "Maximum Price Regulation 330."

The Court: What store is this?

Mr. Goldberg: This is the Market Street store. That is the one of which Mr. Silverman is the manager, and he sent this in. You will recall counsel asked for the Base Period Book.

The Court: What do I need that for?

Mr. Goldberg: Counsel wanted us to verify the top prices, the highest prices as they existed prior—

The Court: You mean in the San Francisco store of the plaintiff?

Mr. Goldberg: In the San Francisco store at the time the [203] defendant's store was opened. Now, this is labeled, "OPA Price Limitations,

(Testimony of Wilfred Lerner.)

spring selling season, March 1, to July 31," and has the following commodities and prices—

Mr. Robinson: It is 1944?

Mr. Goldberg: Yes.

Mr. Robinson: It refers to 1944?

Mr. Goldberg: I will be glad to read it or have the reporter copy it into the record.

The Court: It is up to you gentlemen, whichever way you want it in, if you think it is important.

Mr. Robinson: If Mr. Goldberg will just read it into the record, I believe that will be satisfactory.

Mr. Goldberg: These are our highest prices: Coats, \$59.95. Suits, \$39.95. Women's dresses, \$10.95. Misses' dresses, \$29.95. Jackets, \$7.98. Skirts, \$6.98. Blouses, \$4.98. Slacks, \$6.98. Slack suits, \$10.98. Fur coats, \$49.95. Fur jackets, \$49.95.

Q. Mr. Lerner, what is the size of your store in San Jose?

A. Well, the frontage on the sidewalk is approximately 16 feet. After you are approximately 10 feet inside the door it becomes 20 feet wide. There is jog out from the store next door.

Q. About how deep is it?

A. 110, I believe.

Q. How many people do you employ in your store?

A. There are six besides my wife and myself in the store.

Q. You and your wife work in the store?

(Testimony of Wilfred Lerner.)

A. Well, we are there. We only supervise except when everybody else is busy, and then [204] we actually make sales. Outside of that we do not.

Q. The six employees are sales people?

A. No, we have four sales girls and two in the alteration room.

Q. These newspapers that you advertise in in San Jose are also sold on the street in other communities, are they not?

A. I couldn't answer that.

Q. Haven't you seen them for sale in Palo Alto? A. No, never.

Mr. Goldberg: Are you in a position, Mr. Robinson, to stipulate that the San Jose papers are on sale in Palo Alto? I can prove it but I thought it was such——

Mr. Robinson: I do not know about that, but I haven't the slightest doubt that the San Jose paper probably would be found on the newsstands in Palo Alto. I will stipulate——

The Witness: I don't argue that, either. You asked me if I had seen them. I have never seen them. I lived there almost nine years.

Mr. Robinson: I will stipulate that they are. It is common sense that they would be. But I won't go with you as far as San Mateo, Burlingame, or San Francisco, and that includes Fourth and Market.

Mr. Goldberg: Q. Mr. Lerner, you have customers that come from Palo Alto?

(Testimony of Wilfred Lerner.)

A. I believe we have.

Q. You have quite a few, have you not?

A. We have some, yes.

Q. Do you recall that in your wife's deposition she said about 50 people from Palo Alto had come into your store? [205]

A. Well, I wouldn't attempt to make any count of them.

Mr. Robinson: She also said they were personal friends, Mr. Goldberg.

Mr. Goldberg: She said of those she knew. There might have been others from Palo Alto whom she did not know, but of those she knew.

Mr. Robinson: Then her testimony is there may have been others, but she knew she had fifty personal friends. If you want to state her testimony that is what she said.

Mr. Goldberg: I wouldn't state it in that way——

The Court: Please let us get on. What is the next question of the witness?

Mr. Goldberg: Q. You have customers who come from other peninsular areas that you know of? A. Yes.

Q. Where?

A. We have customers from Campbell, Los Gatos, Los Altos, and some in Redwood City.

Q. Santa Clara? A. Santa Clara, yes.

Q. Mountain View? A. Mountain View.

Q. Sunnyvale? A. Sunnyvale.

Mr. Goldberg: That is all.

(Testimony of Wilfred Lerner.)

The Court: Do you want to ask any questions?

Mr. Robinson: Just about one question while we have him here at this time.

Cross-Examination

Mr. Robinson: Q. Mr. Goldberg asked you about that cut, [206] "The shop with you in mind." Where did you get that?

A. Well, when I was first opening the store I contacted the newspaper down there and I got together with the gentleman who handles our advertising—that is, our district—and with him we planned our first ads. He brought me in cuts and borders to use—in fact, all the cuts seen in those ads, with the exception of one, which was sent out by a company in the East, were furnished by the newspaper. And then he brought me in a set of borders, and that is when we got what Mr. Goldberg referred to, a little cut that had a box stating, "The shop with you in mind." He suggested it as a good slogan to use for the store. That we have followed through ever since. We use two newspaper services, Meyer Both and Metro, which are circulated in every city of any consequence in the United States.

Q. By "service," you mean they give you the wording and language of the ads and you just fill in your prices and put in your name cut?

A. That is right.

Q. This "The shop with you in mind" you never used except in the ads and in the form of the cut?

(Testimony of Wilfred Lerner.)

A. Just the way it is situated in the sheet.

Q. I hand you a paper that states at the bottom, "Meyer Both General Newspaper Service," dated May 4th, and ask you to explain to the Court what that is.

A. This is a page from one of their monthly issues that they send out. It has different cuts, different ads made up, borders, and also usually it contains [207] on other pages the cuts which we use in our advertising of different garments. It also goes into other fields from hardware stores to newspaper work, or any other type of advertising where cuts are used.

Q. Is this the sample that was submitted to you for that cut?

A. That was one of the pages.

Q. "The shop with you in mind?"

A. That is right.

Q. That is the cut at the bottom?

A. That is the exact cut we are using.

Q. That is the cut that appears in your ads at various places where space permits?

A. That is right.

Mr. Robinson: That is all. [208]

Redirect Examination

Mr. Goldberg: Q. You do not know of any other store in San Jose, or which advertises in the San Jose paper, that uses that cut, do you.

A. No. At that time——

The Court: You have answered the question. You do not know.

(Testimony of Wilfred Lerner.)

Mr. Goldberg: There is one question that I wanted to ask Mr. Lerner.

Q. Since you have opened your store you have had people come in who have asked you whether or not you were related to the Lerner store in San Francisco?

A. We have had people come in that upon hearing my name was Lerner asked me if I was related to the people who had the store in San Francisco, yes.

Q. And that has happened once or twice a month?

A. Well, approximately—at the outside. I wouldn't say consistently once or twice a month, but at the outside once or twice a month.

Q. But you do get those questions occasionally?

A. Occasionally.

Q. But you do not know whether the people asking those questions bought merchandise from you or not?

A. No. I wouldn't want to state whether they did or they did not.

Mr. Goldberg: That is all.

The Court: That is all.

Mr. Robinson: Of course, we will reserve our right to [209] examine further the defendant. Is that your case?

Mr. Goldberg: Plaintiff rests.

The Court: We will take a five-minute recess at this time.

(Recess.)

Mr. Goldberg: If the Court please, there are two minor items I think should be clarified. I was not certain in what shape we left the testimony of Mrs. Reynolds, whose report was admitted in evidence as Plaintiff's Exhibit No. 8. What I had in mind doing, what I thought I was doing was, we were stipulating that if Mrs. Reynolds testified she would testify in accordance with this report, then have the report copied into the transcript of the testimony as her testimony.

The Court: That is my understanding.

Mr. Robinson: That is my understanding. I would like to have a copy if you happen to have an extra one.

Mr. Goldberg: I will prepare one for you. I have a copy, and the reporter will copy Exhibit 8 into the record.

The Court: It is an exhibit. I do not think it has to be copied.

Mr. Goldberg: I think purely as a matter of convenience, if it is at the place where she is sworn, it might be simpler.

In connection with the testimony of Mr. Magee on a matter that the Court thinks is probably irrelevant, but in any event I think there is a slight misapprehension—there is in [210] my mind—on this firm that was known as Lerner's or Lerner-Vogue, it is my understanding—and I have confirmed it with Mr. Magee—that after the settlement with that company was made, the name of certain of the stores was changed to J. S. Lerner-Vogue,

and the names of the other stores were changed to some altogether different name not having "Lerner" in it. But I think this morning there was some confusion as to whether the name presently used by that company was Lerner-Vogue or J. S. Lerner-Vogue, and it is my understanding it is merely J. S. Lerner-Vogue; is that correct, Mr. Magee? May his testimony be clarified to that extent, or at least amended?

The Court: Is that agreeable?

Mr. Robinson: So stipulated. Is that your case?

Mr. Goldberg: Yes.

Mr. Robinson: Let the record show, then, a motion for a nonsuit.

The Court: We call it a motion to dismiss.

Mr. Robinson: Or a motion to dismiss.

The Court: In the Federal Court.

Mr. Robinson: If your Honor wishes to withhold a ruling on that until we offer a very slight amount of evidence——

The Court: Counsel, I do not know that it is necessary to offer any evidence. I am going to call on counsel for the plaintiff to point out any of the equities that they think are in the case. I do not think there is any need to add to [211] the record in the case.

Mr. Robinson: I do not think of anything. I do not know if there is a picture of our present store in evidence.

Mr. Goldberg: Yes, there is.

Mr. Robinson: I mean a full view.

The Court: That is Plaintiff's Exhibit 9.

Mr. Robinson: We have some evidence to this effect, your Honor, which your Honor may or may not wish in, undisputed evidence as to where he was born, when he got married, how many years he has been living in Palo Alto.

The Court: The plaintiff has not made any point on that.

Mr. Robinson: His activities down there, all going to the question of good faith. There is no evidence here except the use of the name with which the defendant is charged, and I have observed that your Honor has indicated a desire to limit the issues, and for that reason only I am withholding any further evidence, unless your Honor thinks it would be of some assistance to the Court.

The Court: I have heard this case argued, don't you remember, at a pre-trial conference, too, as well as here, and the picture is the same: There is an elaboration of some of these matters, but the general overall issue that is submitted is the same as argued at the pre-trial conference.

Mr. Robinson: The only thing that occurs to me is this: As it stands now, the only thing upon which it appears to me [212] any complaint can be based is the manner, the place and the time at which the name was used. It might fortify Mr. Lerner's position to some extent.

The Court: If you wish to submit the matter at this time——

Mr. Robinson: I will take maybe ten minutes.

The Court: I am only suggesting this, counsel, because I do not see any real disputable issues of fact involved in the case.

Mr. Robinson: I will run over this rather rapidly.

WILFRED LERNER

recalled in his own behalf; previously sworn.

Direct Examination

Mr. Robinson: Q. Mr. Lerner, what is your age? A. Thirty-nine.

Q. How long have you been married?

A. Seventeen years.

Q. You have one child, have you not?

A. That is right.

Q. You were born in San Francisco?

A. San Francisco, January 3, 1906.

Q. You went in business with your father some years ago, did you not? A. I did.

Q. When?

A. In 1926. I was first connected with him and became a special partner in 1942.

Q. But you were connected with your father since sometime in the twenties? A. Yes.

Q. What kind of business was that?

A. The manufacturing of ladies' coats, suits, and sometimes dresses.

(Testimony of Wilfred Lerner.)

Q. In the course of that business you had dealings with the retail outlets? A. That is right.

Q. Did you travel around and make calls on the outlets? A. I did occasionally.

Q. Among the places you traveled was San Jose one of them? A. That is right.

Q. Did you travel up and down the Peninsula and other places?

A. My most regular stops were from San Jose to San Francisco and **Oakland**.

Q. You lived in San Francisco during part of this time, did you not?

A. Until approximately nine years ago.

Q. That would be nine years from now, or nine years before you opened your store?

A. Well, nine years from now—about ten years ago, about 1935.

Q. About 1935. And where did you move to then? A. Palo Alto.

Q. Did you live continuously in Palo Alto until the time you opened your store in San Jose?

A. Until approximately eleven days after we opened the store.

Q. What is the reason for the fact that your store was opened first and then you subsequently moved to San Jose?

A. Because we couldn't find a place to live in San Jose. It took us over four months to find a place.

Q. When did you first make up your mind to

(Testimony of Wilfred Lerner.)

go into the ladies' [214] ready-to-wear retail business? A. Back in 1931 or 1932.

Q. And during that time did you look for opportunities and locations?

A. At different periods during that time I did.

Q. When did San Jose first come to your attention, attract your attention as a place for opening the store?

A. Approximately 1938 or 1939.

Q. And what did you do at that time?

A. Well, there was a shop down there by the name of the Hollywood Shop. It was owned by a father-in-law of a very good friend of mine, and I attempted to purchase it when he was selling it, I believe it was in 1939, but it was sold to someone else before I could make any complete arrangements on it.

Q. At all the times that you had intended to go into business, under what name did you intend to go into business?

A. There never was any question that I was going to use my own name, Lerner's.

Q. Under what name were you in business with your father? A. L. G. Lerner.

Q. That was the name of that firm of which you later became a partner?

A. That is right.

Q. While you resided in Palo Alto did you and your family, you and your wife, become widely acquainted on the Peninsula. A. We did.

Q. That included San Jose?

(Testimony of Wilfred Lerner.)

A. Yes, sir. Our acquaintances on the Peninsula ranged from—well, you might say all [215] the way from San Jose to San Francisco, because we still knew people in San Francisco, and the Peninsula as a whole is grouped together in different organizations.

Q. Do you and your wife belong to Peninsula organizations? A. We do.

Q. By “grouped together” what do you mean?

A. Well, they don’t have different lodges or chapters in each community. One will suffice for the entire Peninsula in most cases.

Q. In other words, if you belong to an organization it would embrace both Palo Alto and San Jose? A. In most cases.

Q. Can you name some of the organizations to which you or your wife belonged?

A. Well, I wasn’t too active down there. I belonged to the B’Nai B’Rith, which was the only organization that I had joined down there, but my wife was both member and officer in B’Nai B’Rith, Hadassah, Council of Jewish Women, American Red Cross—she was quite active in, held a titled job—I don’t recall the name of the exact job.

Q. What did she call herself in her deposition, do you remember? I think she was director or president, something like that.

A. Parent Teachers Association—in fact, practically all or a good percentage of all the organizations.

Q. In the course of your wife’s activities did

(Testimony of Wilfred Lerner.)

you have occasion to accompany her, meet with and mingle with the people in those organizations?

A. Oh, yes, many occasion.

Q. Even though you yourself were not a member? [216]

A. That is right.

Q. They being mostly ladies' organizations?

A. They all have evenings when they try to raise money.

Q. Did you make any other efforts to get a retail store in San Jose?

A. Yes, for the past three years I have had someone looking in San Jose for me for a store.

Q. Did you get to the point of actually looking at locations?

A. Oh, yes, several times.

Q. Did you ever get to the point of actually discussing rents and terms either directly or through an intermediary?

A. Well, I had a friend of mine who was in business in San Jose who was really my scout and who looked after the different vacancies as they came about for me, and would inform me of them, find out the rentals, who owned them, who offered them for lease. And after he would get that information I would go down and look over the store. As a matter of fact, the store I am in now he made all arrangements for me up to and including the point of an appointment with the owner of a building.

Q. Prior to that time you or he for you had negotiated for locations that you did not take?

A. That is right.

(Testimony of Wilfred Lerner.)

Q. Do you recall some of those?

A. Well, there is Hale Brothers had a store offered across the street from where their store is now that they had their appliance shop in. That was offered as a sub-lease. In that block below there were two stores that were offered to me. Then the Hollywood Shop—we [217] approached to buy the Hollywood Shop about a year and a half ago when one of the brothers of the family, who was the manager of the store, was drafted. We tried to buy that store. Incidentally, that store is on the same block, about four or five doors of where I am now located.

Q. When did you make a lease in San Jose?

A. Either February or March. I don't know—I believe it was the latter part of February in 1944.

Q. And then you immediately started making arrangements to open up?

A. That is right.

Q. And you did open up; correct?

A. That is right.

Mr. Robinson: Mr. Goldberg, have you offered in evidence any ads in addition to those which are attached to the complaint?

Mr. Goldberg: We offered the last one that the defendant has inserted in the paper, the one of April 22, 1945.

The Witness: That is not in the book, Mr. Robinson. That was last Sunday's ad.

Mr. Robinson: I see. Could I see that and see

(Testimony of Wilfred Lerner.)

if that is a fair enough exemplar of all of them as they now are?

Q. Does that have the word "Home Owned"?

A. Should have.

Q. I do not suppose there is any need of putting in more ads. They are merely variations of the same setup. Your name has been Wilfred from birth, I suppose, to get that into the record?

A. That is right. [218]

Mr. Robinson: I think that is all.

Mr. Goldberg: Q. It is Wilfred A. Lerner, Wilfred Alexander Lerner? A. That is right.

Mr. Robinson: I might ask him one question. You will probably elicit it anyway.

Q. How did you happen to choose the particular script, design, that was used for your sign? Is that a clear type, or is it a specially made design?

A. I had a commercial artist—I don't recall his name; I believe it was a Chinaman on Post Street upstairs from Liebes' where he has his work room or office. I went to him and I wrote my name out in the manner in which I signed my name, and I said to him, "Make me a drawing using this type of script." From that drawing all our goods and signs have been made. It is as close a replica of my own signature as you can make and have legible.

Q. Was that the same man who later added the "Wilfred"?

A. No, he was a commercial artist. The other

(Testimony of Wilfred Lerner.)

man who added in the other was the sign man in San Jose.

Q. You used that as a basis?

A. I used that as a basis. The original card is the one that has been blown up and all these cuts and everything else has been made up, and the sign man in San Jose had the "Wilfred" added.

Q. And your literature and your signs—I mean the main part of it is based on this first cut?

A. With the exception of the sales tags which were printed before cuts were [219] available, all the other printing is in that.

Q. Tell us about those sales tags. Those tags are what customers get when they make a purchase, is that right? A. That is right.

Q. I do not know whether you explained to Mr. Goldberg whether you were able to obtain others with your cut.

The Court: He said it took six months to get them.

Mr. Robinson: Q. You have ordered them, have you not? A. Yes.

Q. Do you intend to use them when you get them? A. I presume so.

Q. Now, Mr. Lerner, you have charge accounts and budget accounts? A. We do.

Q. You make deliveries free, without charge to the customers?

A. We do, any place the law allows us to.

Q. Any place the ODT allows you?

(Testimony of Wilfred Lerner.)

A. That is right.

Q. Do you make alterations?

A. We do. We charge for most alterations, however.

Mr. Robinson: By the time we are through we will have your Honor going to San Jose to buy.

The Court: I think you are covering ground that has been covered already. Mr. Goldberg brought out some of this. I may be in error about this. I heard it some place or other.

Mr. Robinson: I brought out from one of the ladies that Lerner's in San Francisco did not make alterations, did not [220] make deliveries, did not have——

The Court: Is there any other point you want to bring out?

Mr. Robinson: Q. Generally speaking, Mr. Lerner, your price lines are higher than those of the plaintiff, of Lerner stores in San Francisco or elsewhere, so far as you know?

A. That is right.

Q. That is, your lowest price would generally be higher than their lowest price, and your highest price would be higher than their highest price?

A. That is right.

Mr. Robinson: That is all.

Cross-Examination

Mr. Goldberg: Q. Your sales, however, are generally made somewhere between the highest and the lowest prices of a particular article, are they not?

A. Well, every sale is not made at the highest

(Testimony of Wilfred Lerner.)

price, if that is what you are trying to get at. We sell merchandise at all the various prices.

Q. Including the lowest prices? A. Yes.

Q. You referred to this business of your and your father having manufactured dresses. That had not occurred for four or five years prior to the opening of the store, had it?

A. That is right.

Q. Your father's business is no longer in existence, is it? A. That is right.

Q. What is the rate of mark-up or gross profit that you figure [221] in your business?

A. Our average gross mark-up is around 42 per cent.

Q. That is, your average gross profit on the sale is 42 per cent? A. That is right.

Q. In other words, if you sell at a dollar, your gross profit is an average of 42 cents?

A. That is right.

Mr. Goldberg: I think that is all.

Redirect Examination

Mr. Robinson: Q. In this matter of prices, Mr. Lerner, when you opened, you recall the OPA regulation that a newly opened store that was not in business during the base period fixed its prices by the prices of its competitor nearest to itself?

A. That is right.

Q. What is the competitor that does the nearest type of business to Lerner's store in San Jose?

A. Grayson's.

Q. Grayson's? A. That is right.

(Testimony of Wilfred Lerner.)

Q. Zukor's down there?

A. Zukor's also.

Q. You heard the testimony of these gentlemen here that Lerner's even undersells those two?

A. That is right.

Q. When you fixed your OPA ceilings who was your nearest competitor?

A. The OPA granted us the right to use Blum's, a specialty shop, one of the finest specialty shops in San Jose, as our nearest competitor.

Q. And that is your price range?

A. That is our price range. [222]

Q. As a matter of fact, your OPA price list is Blum's price list, is that right?

A. That is correct.

Mr. Robinson: Mr. Goldberg has stipulated I might read into the record the March 1944 highest price line, which corresponds to the list that he read in.

The Court: Very well.

Mr. Robinson: Women's coats \$149; Misses' coats, \$149; Women's suits, \$59.95; Misses' suits, \$59.95; Jackets, \$10.95; Skirts, \$12.98; Misses' — misses' and women's are duplicates all the way through—Dresses, \$89.95; Blouses, \$9.95; Sweaters, \$10.95; Slacks, \$6.98.

Mr. Goldberg: There seems to be some mistake. Those prices do not jibe at all with the testimony the witness gave.

(Testimony of Wilfred Lerner.)

The Witness: We are entering Blum's ceiling prices as granted by the OPA. That is what we have to keep on record.

Mr. Goldberg: Q. That is your actual top price?

A. In some cases no; in some cases our top prices today are higher than those, because we have been allowed by the OPA a change since June 30.

Mr. Robinson: I am giving the prices that are comparable to your March 1944 prices. Your witness Silverman gave the later prices.

Mr. Goldberg: I think we are getting into some confusion here.

Mr. Robinson: There is only one more figure. Let us get it in.

Mr. Goldberg: The witness testified to his price range, the lowest and the highest prices for particular items, and if what counsel is reading is intended to be a deviation from that or a change in it, then I would like to understand so I can cross-examine the witness. I would like to understand what this list is.

Mr. Robinson: There is only one more figure, then I will explain it. Women's slack suits, \$19.88. The reason for the two prices, the fall price line and the spring price line, the fall price line is higher than the spring price line.

Mr. Goldberg: The one you read is very much higher than the one the witness testified to. The witness testified to a top price of \$29.95, and you read a price of \$89.95.

(Testimony of Wilfred Lerner.)

The Witness: Pardon me, Mr. Goldberg. This is Blum's ceiling prices that the OPA granted us. The price of \$29.95, as I told you, was a price we have today in the store at present. In other words——

Mr. Goldberg: In other words, the \$89.95 has no relation to your actual business.

The Witness: Yes, is has in this respect, that the OPA granted us the right that we were of the class of store that could carry that.

Mr. Goldberg: Q. But you do not?

A. I do not happen to have it today, because I can't get it today. I might have it tomorrow.

Q. You never have had?

A. He have had higher priced merchandise, but I have not given you any incidental sales. We have sold a fur coat for \$475 plus tax, but I haven't even quoted that in the testimony, because it was one occasion.

Q. It isn't your regular line of business?

A. That is right.

Q. And \$89 prices are not your regular line of business?

A. If we could get them today we would have them consistently, because we have a class of trade that would pay for furs.

Q. But you have never sold one up to now?

A. No.

The Court: Haven't we covered this?

Mr. Robinson: One question.

Q. Do you know Weinstein's in San Francisco?

A. Yes. During my lunch hour I went over and

(Testimony of Wilfred Lerner.)

visited Mr. Blum, who is the buyer there, and ascertained their average mark-up is 33 1/3 percent, and he will confirm that if you wish him to.

Q. Mr. Lerner, on your disposition I believe you classified the plaintiff, Lerner store, as low end?

A. I did.

Q. By "low end" you mean the stores that sell at the cheapest prices? A. That is right.

Q. Whatever the terminology is, they are the lowest? A. That is right.

Q. And you are not? A. That is right.

Q. And you have no intention of being?

A. No, sir.

Mr. Robinson: That is all.

Mr. Goldberg: Q. Is it your testimony that no one else sells at lower prices than Lerner's, the plaintiff.

A. No, I do not know throughout the United States, because I believe in New York Klein's might undersell you. But I do state that in the classifications your type of merchandise is known as low end merchandise.

Q. Would that apply to merchandise that we sell at the same price that we do?

A. The same price?

Q. We have dresses at the same price that you do, do we not? A. That is right.

Q. Would those also be called low end?

A. That is your top price merchandise, but that is not your average. Our average percentage sales

(Testimony of Wilfred Lerner.)

of our \$8.95 dresses won't run two percent of our business.

Q. You also sell \$7.95 dresses?

A. Yes, sir, occasionally.

Mr. Goldberg: That is all.

The Court: Is the evidence completed now?

Mr. Robinson: Just one thing. I will at least offer it. I forgot to have Mr. Lerner identify it. You gentlemen know it, however. It is the photograph which I showed to Mr. Magee to see if he could identify it. It is a photograph of a store in San Francisco, 1025 Market Street, exactly two blocks from the Lerner shop. It is on Market Street. I will offer that in evidence as a defendant's exhibit to show there is a store using block letters "Lerner Hat Shop," and that Lerner's also handle hats.

Mr. Goldberg: I will object to the offer, if the Court please, on the ground it is not a fair representation of the actual print which meets the eye of anybody who sees it. I went out and looked at it myself, and I think it is a very unfair representation.

Mr. Robinson: I do not know that it is much different from the one you took looking up from the base of a lamp post.

Mr. Goldberg: We showed at least what a person would see from that direction. If your Honor will look at it——

The Court: I will allow it in subject to your objection.

Mr. Robinson: I will correct the objection if you will only wait a minute.

(Testimony of Wilfred Lerner.)

Mr. Goldberg: That is a small part of the store.

Mr. Robinson: It shows more than any of your pictures show of our store, so it can't be unfair, and it is not taken by a man lying on his back as yours were.

Mr. Goldberg: I think you ought to withdraw that. You have no foundation for it, and it is not true.

Mr. Robinson: Except the angle of the shot.

Mr. Goldberg: I wish you would testify to those things instead of making a statement you do not know anything about.

The Court: Is this the same one?

Mr. Goldberg: I do not think it is a fair representation. However I think it is immaterial.

The Court: I will allow it in evidence subject to your objection.

(The photograph was marked Defendant's Exhibit C.)

The Court: Does that conclude the evidence?

Mr. Robinson: That is the case, your Honor.

The Court: I would like to hear from counsel for the plaintiff, as I said before, on this matter. I have been unable to see any equities in this case.

(Argument.)

The Court: The judgment will go for the defendant with costs, and you may submit findings as provided in the rules.

[Endorsed]: Filed May 28, 1946.

No. 11347

United States
Circuit Court of Appeals

For the Ninth Circuit.

LERNER STORES CORPORATION, a corporation,
Appellant,

vs.

WILFRED A. LERNER,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

In the Southern Division of the United States District Court in and for the Northern District of California

Before: Hon. Louis E. Goodman, Judge.

No. 23,662-G

LERNER STORES CORPORATION, a corporation,

Plaintiff,

vs.

WILFRED A. LERNER,

Defendant.

REPORTER'S TRANSCRIPT ON OBJECTIONS TO PROPOSED FINDINGS

Monday, December 24, 1945

Counsel Appearing: For Plaintiff: John J. Goldberg, Esq., Sam A. Ladar, Esq. For Defendant: Henry W. Robinson, Esq.

The Clerk: Lerner Stores Corporation v. Wilfred A. Lerner.

Mr. Robinson: Ready, your Honor.

Mr. Goldberg: Ready, your Honor.

The Court: You may proceed, gentlemen.

Mr. Goldberg: Would your Honor desire plaintiff to proceed [1*] first with objections to the proposed findings? It does not make any difference, whichever may be proper.

* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Robinson: I will say that the defendant has prepared the findings accurately, honestly and fairly, and that the burden under the circumstances is upon the plaintiff, the losing party, to indicate wherein they are not accurate or unfair to the plaintiff.

The Court: There seem to be a lot of amendments.

Mr. Robinson. There is an entirely new set of findings proposed.

The Court: Of course, I have not any objection to hearing objections to the proposed findings except that I do not think that this proceeding ought to be converted into a motion for a new trial, unless you want to stipulate that it may be. I notice at the end of the plaintiff's findings there is a proposed finding that plaintiff have judgment. Of course, those matters may only be raised on a motion for a new trial.

Mr. Goldberg: That is the last paragraph of the conclusions. I suppose that can be ignored.

The Court: If the proposed objection is to findings that support the judgment that is made, there is no use spending time on hearing that. There is a provision of the rules that you can make your objection to the findings, or, rather, make a motion for a different finding at the same time you make a motion for new trial, and many lawyers fail to take [2] advantage of that. As a matter of fact, I think that unless there is some finding of fact that is clearly a mistake that most objections to findings can be reached in that way, because the court at that

time can pass on the motion for a new trial or motion to amend the findings.

Mr. Goldberg: We had that in mind, but it seemed to us in going over the proposed findings submitted by the defendant that there are a number of serious questions of fact, not just the final conclusions, but facts that are involved in our objection to the findings, and we felt that we would be free to discuss any matters of law or of conclusions that might develop at this hearing. Nevertheless, our object is to discuss the proposed findings and the facts because we do not feel that we could properly discuss that question of any difference in ruling until we have a set of facts that in our judgment represent the state of the record. So we had in mind that we would address ourselves to the proposed findings and our objections to them, and then if we should have a set of facts that in our judgment conformed to the record, and if on those facts the court makes a ruling that is adverse, we would then be in a position to move for a new trial and at the same time move to substitute other findings, in which event we would not be concerned with questions of fact so much as we would with the conclusion. Our thought this morning was to discuss the proposed findings of fact——

The Court: So that you will not be too much aggrieved by such ruling as I may make, in the settlement of findings I feel that the judge, having decided the case on the facts in favor of one side, is not required to find facts that are favorable to the other side of the case, because all of those matters

are in the record and may be raised on appeal, or a motion for a new trial. I know that the attorneys sometime ago in a case felt aggrieved because I would not make findings in the case as to the facts that were favorable to his side, and would only make findings of fact that were favorable to the other side, and I said that I felt I found from the facts that sustained the judgment that I wanted to give in the matter, and that I either did not believe or did not accept or did not give weight to the other facts, and I saw no reason for making a finding in the record, that the facts were in the record, and if the judgment was not sustained by the facts which the court found then, of course, they could be set out on rehearing or motion for a new trial, or on appeal. So I say that if I rule against you, because you want me to find some facts in the case that you think would help to sustain a finding the other way, I will rule against that, because I do not think that matter is before me. I think that the court can find the facts that it believes in its judgment and in its conscience are the facts, that it wants to find that sustains the judgment. I just want to make that clear. You can [4] raise any point on a motion for a new trial that you can raise, but I do not think that any court should stultify itself by making some finding of fact in favor of the side that has not been successful. It does not make sense to me. However, you present the matter any way you wish, but I just want to point out to you I am only going to make findings necessary to sustain a judgment in this case.

Mr. Robinson: I have gone with considerable care and detail into the history of the plaintiff corporation, much more in detail than in the complaint, itself, so that in fairness I would present what I thought was the legal issue which the plaintiff asserts gives him the right to judgment, namely the way in which he has built up in California a number of stores, in Los Angeles, San Francisco, Oakland and Bakersfield, and so on, to present very clearly whether that simple fact, that they have built up their chain organization, gave them a right to preempt a particular city.

The Court: All I decided in this case was that there is not any unfair competition, and why the court has to do anything in this case except to find on the facts that there is no unfair competition, I do not see. I think the findings should be on a page and a half.

Mr. Robinson: But in fairness to plaintiff, since Mr. Goldberg devoted so much time to that point, I merely wanted to point out that I did not leave those things out. I believe [5] they are in there with as much if not more detail than the plaintiff has in its proposed findings.

The Court: I think I have said too much already. I just wanted to state how I generally felt about findings. If there is any particular finding that you think ought to be changed you go ahead and call my attention to it and I will dispose of it.

Mr. Goldberg: We may have approached this from a point of view that does not coincide with that of the court, but feeling that this is a rather serious

matter to both parties, we felt that the facts as presented here in court, which so far as they are material should be found by the court even though really those facts are undisputed and material and they might or might not support the judgment. It seems to me that if there are facts in the record which are material and undisputed the court should make a finding on those facts even though they may be the basis for argument on appeal that those findings are inconsistent with the judgment. It certainly has been my long experience, of many years, that that is the function of findings. I may be mistaken, so far as this court or its practice at this time is concerned, but I do not so understand it.

Now, it is true that a finding can be made that there is not unfair competition between the plaintiff and the defendant and in the sense that finding is an ultimate fact, but it seems to me that to support such a finding there should be at least a subsidiary finding as to whether there is competition between the parties, fair or unfair, to begin with. It is my understanding of the court's decision and conclusion that there is no unfair competition here, because there is not in fact competition, and whether or not there is competition is a question of fact as to which the evidence in this record has some bearing, and whether or not that competition is unfair, there is also evidence in the record. So that it seems to me that we are entitled to have the finding of ultimate fact include a finding on whether or not the plaintiff in this case under the facts in this case comes within the protection of the rule of law that

where you have proof of a growing business, an expanding business, a continuous practice of expanding in outlying areas from focal points, that that protects that business in the normal expansion area, even though it has not actually reached all of that area. If there are facts in the record to support that it seems to me we are entitled to a finding thereon, even though it could be argued that such a finding is contrary or inconsistent with the court's conclusion. In other words, I think the findings should find on all of the material facts, even though there may ultimately be only one fact in the court's mind which is determinative of the final conclusion. In other words, even though it is the court's judgment that because San Jose is 50 miles from San [7] Francisco and the plaintiff did not actually have a store in San Jose at the time the defendant opened his store, even though that may be entirely in the court's mind, that there is no competition between these parties, nevertheless there is a good deal of evidence in the record which tends to show that there is trading in San Francisco by people who live in San Jose and surrounding areas, and that the plaintiff has offered records in this case and has testified it has customers in the San Jose area; whether that is sufficient in size to move the court may be another question, but the fact that exists is a material element, as we believe, pointing to a conclusion of law, even though the court disagrees with that, it seems to me that when those facts are developed they should present those material facts upon which it could be urged that the judgment is or is

not supported by the findings and all of the evidence in the record.

It is true that if only certain facts are picked which support the judgment and all of the other facts are ignored, that the appellant has an opportunity to point out those facts to the court above, but I do not know of any practice that would say that it is improper to include all of the material facts. I am not taking issue with the court on that, because I am sufficiently familiar with the court's practice here on that particular point. It seems to me and it has always been my opinion that findings should state facts [8] if they are true and material, even though they are inconsistent with the conclusion.

The Court: I just want to say one thing. In what I stated I was speaking of the Federal Rules of Procedure and the philosophy which has been developed there, particularly in the last two or three years, and that is to simplify all of the methods of procedure, and that in fact is shown in some discussions leading up to the formation of rules and proposed amendments to the present time. You will find that the provision of the rules for making a motion to amend the findings at the time of making a motion for a new trial is the rule getting at the very matter that you just mentioned. If there is some finding requested by the losing party at the trial, it is presented in the motion for granting a new trial. There is not a single point of the nature that you have just mentioned that cannot be better raised and more justly determined at the time of

the motion for a new trial than at the present time, because obviously the function of the court then is to reexamine the decision and see whether or not there is a foundation for it in the facts, whereas the purpose of this proceeding is just to see that there are findings of fact upon material issues that are necessary to sustain the court's decision, without regard to whether or not the court should grant a motion for a new trial. I think you would be better off to argue your motion for a new trial, [9] and at the same time what I am suggesting to you is not to debar you from going ahead with any showing that you want to make in connection with the inadequacy of the record or the decision of the court.

Mr. Goldberg: What we have done here is to just point out our objections to the defendant's findings as such, and then to propose findings of fact which have been proved. It seems to us our findings of fact were proved, and do not merely set forth our view of those facts. It seems to me this record has very little of actual conflict in it on the evidence as it has come in. Our purpose this morning is to point out to the court that there are inaccuracies——

The Court: I do not want to interrupt you again, but I just happened to pick up your proposed amendments at random. I notice on page 5 in paragraph 5, you say, "There is uncontradicted evidence that defendant's conduct did cause confusion of prospective customers and damage to plaintiff." You propose a finding on that basis?

Mr. Goldberg: Yes, on that basis.

The Court: If I sustained your point on that then I would to some extent nullify the decision which I made.

Mr. Goldberg: Of course, that is the reason why we wanted to point out the transcript references.

The Court: I just could not accept that testimony. I do not want you to feel aggrieved because I found against the [10] vital condition for which you contended, but I do not think there was any confusion, I don't think there was any damage. That is the way I felt about the case. I could not put down that I am in doubt that there was confusion and there was damage and contemporaneously make a decision in favor of the defendant.

Mr. Goldberg: The purpose at this time is to point out to the Court that the defendant in his proposed findings states that there was no confusion and there was no damage, and we believe that we are entitled to and should point out to the court to the contrary.

The Court: I think you are entitled to do that, but the proper place to do that is on a motion for a new trial or on appeal. If you are just going to reargue the case I have no objection to doing that. If you want to convert this into a motion for a new trial I will hear you; I am not trying to shut you off, but I do not want to hear it twice.

Mr. Goldberg: I understand that, but it seems to me there are two separate problems here. The first is to see whether the findings as ultimately signed by the court are accurate. It might be that this, being only one of a number of facts presented

to the court, it would nevertheless say in spite of the facts pointed out the court did not accept that testimony and would not make any finding to that effect; but there are other statements in the proposed findings which [11] we consider as not only inaccurate, but in fact unfair in the omission of matters or in mis-statements of matters. It would seem to us we ought to have an opportunity to point out to a court why findings are inaccurate, and when those findings have been signed and we want to attempt to change the view of the court on motion for a new trial, then we would do it on the basis of the findings signed by the court, whereas these proposed findings we do not believe the court should sign even though its conclusion as to the decision remains the same.

Counsel, for instance, stated that he tried to point out the history of the corporation, the plaintiff in this case, as to its inception and so on. We take issue with counsel. He started in 1930. He says in paragraph 2 in 1930 "Lerner Stores Corporation, a corporation, incorporated under the laws of Delaware." The record shows that the plaintiff's stores were opened in 1919 and regularly thereafter, and that has a bearing on the policy and practice of plaintiff to extend its operations throughout the country.

The Court: If you consider that it is necessary to include all of those things, I have no objection, if you want to go into detail as to the organization and development of plaintiff's chain stores, but I do not think that the history of the corporation has got

very much to do with it. If you feel that has anything to do with it, as long as the plaintiff has put in the history of it, have you any objection to its [12] going in, Mr. Robinson?

Mr. Robinson: Mr. Goldberg has merely changed it to put it in the form it is in the complaint. Your Honor will observe that there were several corporate changes which the plaintiff brushed over. Of course, on the examination of Mr. Magee I found out that the plaintiff corporation has not continuously been in operation since 1919 or something like that. I have not gone prior to the time that plaintiff came to California.

The Court: You can put all of that in if you want to, but I am going to add a finding at the end that it did not enter into my decision in the matter, at all. I do not think it will do any good one way or the other.

Mr. Goldberg: I think it will do good if we are correct in our theory.

The Court: Let me interrupt you once more, and it may possibly shorten this or it may not. I did not take into account any of these matters, at all. My decision was based on the fact that here was a chain of stores that did have a good will and were doing business under the name of Lerner shops, with all of the good will and proprietary rights that are inherent that you speak about, but that in this particular case there was not any confusion between your shop in San Francisco and the defendant's store in San Jose, and that there was not any unfair competition about it. I think that is all there is in

the case as far as I am concerned. If I were drawing [13] the finding, as many Federal judges do, that is all I would say. I would say that the long history of this corporation was not a determining factor in my opinion of the issues of fact upon which the judgment has been based. It is just as simple as I have said it. You can elaborate on that if you want to.

Mr. Robinson: I might give an interesting sidelight,——

Mr. Goldberg: I might say, I am being hampered in trying to properly present this matter by these interruptions of counsel.

The Court: I am at fault, too, I have been interrupting too.

Mr. Goldberg: I am happy to have the court's views.

The Court: I am just giving you my viewpoint.

Mr. Goldberg: Yes. It is of some importance to state that the persons who started the plaintiff organization, who have been the most active in it, and who have continued to be so until the second generation, as well as the first, are people by the name of Lerner, and it is important to see that the defendant calls his business Wilfred Lerner's Store, because his name is Wilfred Lerner. There is no reference in the proposed findings to where this Lerner came from, whether it was just picked up by somebody because they thought it would take away somebody else's good will or whether it came from the people who started it. So that [14] our first proposed findings on that subject is to the effect

that the officers and directors of plaintiff include three persons by the name of Lerner, and include two sons of those persons who are in this same organization. That is in the proposed findings, paragraph 2. We then say that from 1919 on that the original names of these companies, all of which were called Lerner, whether they were blouse, or a store, it was always Lerner, and there ultimately were established 181 stores in 41 states, and that it was their practice to open stores in outlying areas and subsequently branch out into the outlying areas, all of which are found in the record, as to which there is no dispute, and it seems to me the only question now is, is it material? We on our part feel that it is material, because we think that the cases which have dealt with situations of this kind have uniformly determined that such a corporation is entitled to expand into certain normal expansion areas which the court feels in this action does not apply to San Jose, but which we believe is a matter for discussion and perhaps difference of view by the court, but that is at least the basis or starting point of the plaintiff's case.

There is nothing in the proposed finding to the effect that the business, although conducted under the name of Lerner Shops, as a formal matter, is actually known to a majority of the customers and the public as Lerner, which is the precise name under which the defendant commenced his business. [15] There is no dispute in the record about it and we think it should be included in the findings.

It has been established that the plaintiff has a

valuable good will. We have set forth the fact that it had substantial sales and the profit that is made therefrom in 1945. It has a valuable good will. We think these are basic background facts which belong in a set of findings involving this situation, and we believe that they would be of assistance in a set of findings in determining whether or not the correct conclusion has been drawn from the facts.

I am not asking the court at this time to make findings favorable to the plaintiff as to any facts as to which there is a dispute, but certainly as to facts which are not in dispute we think that the plaintiff is entitled to have material facts recited in the record, material to the plaintiff's claim, as well as to sustain the conclusion drawn by the court.

In paragraph 7 we show the establishment of the stores in California. We have the transcript record on all of these establishments. We have actually shown the place and the year when established; then the fact that the plaintiff, prior to the commencement of the business by defendant had acquired by lease or purchase a number of additional locations in California for the establishment of its stores to establish the carrying out of its policy of expansion into outlying areas; and that that included the taking of a lease at San Jose. [16]

I appreciate that your Honor feels that the mere fact that taking a lease standing by itself would not preclude the defendant from opening business, if all that happened was that somebody many miles away had decided he would like to do business in San Jose and went in and took a lease and did

nothing more for this reason, or any reason, and then another party like the defendant went in and opened a store; that is in the absence of a lease I do not think merely taking the lease, standing by itself, is a determining factor, but I do know that in a number of cases involving this principle of expansion the fact that the moving party had made arrangements to open a store or a place of business in that vicinity and territory was commented upon by the court and given a certain amount of weight. Whether it should have the weight for which we contend or not is a matter for the court's conclusion, but we believe that it is one of the material facts in the picture which should be in the findings. There is not any dispute as to the fact.

Now, then, in paragraph 8 of the proposed findings, we make transcript reference to sales. There is not any dispute that we had a certain part of patronage from people in San Jose. We had in court original records of persons with names and addresses living in San Jose, in Palo Alto, Redwood City, and the surrounding area, who had credit slips or exchange slips, which are our only means of knowing the names [17] and addresses of our customers, because we do a cash business, and except on those special occasions we did not keep records of their names and addresses. It was without dispute that exchanges and refunds which would be represented by those records represented a certain proportion of the company's business as a whole from which the witness on the stand concluded that a certain amount of business or a cer-

tain number of customers per month came from these various areas. There is not any dispute about that. Whether it is sufficiently material to move the court is another question. But as a matter of fact it is there, and we feel that it should be a part of the picture in determining whether or not there is competition between the two parties. That is recited in paragraph 8.

In paragraph 9 we refer to the fact that the plaintiff's name to the majority of the public is Lerner's, even though it calls itself Lerner's Shops; also that there is not any store except for the defendant's store in the retail business for the sale of women's wearing apparel in the State of California, or on the Pacific Coast, under that name.

In that connection, there is a proposed finding by the defendant in this matter of L. S. Lerner-Vogue, which is completely misleading. I will read that part.

The Court: What page is that?

Mr. Goldberg: It is on page 3, beginning with line 5 [18] of defendant's proposed finding. After citing a number of stores of the plaintiff it says: "Other such stores, under the name of 'L. S. Lerner-Vogue,' are operated in about 20 cities in the United States by a corporation having no connection with plaintiff or any of its subsidiaries. Plaintiff's subsidiary corporations own and operate such stores under the name of 'Lerner Shops,' in cities which, in some cases, are less than 100 miles distant from the cities in which are located said above-

mentioned stores operated under the name of 'L. S. Lerner-Vogue'."

If we are going to put it in then it should appear in the first place as we set forth in our finding, that these stores which were originally operated as Lerner-Vogue until the plaintiff complained were all located in a circumscribed area in the Midwestern and Southwestern States and not generally over the United States; in the second place, that they are not operating in those 20 cities under the name of Lerner-Vogue; that in the first place J. S. was added to the Lerner-Vogue name because of the plaintiff's complaint, and in the second place that in a number of cities and in all of the cities in Texas, where this company has stores, it has eliminated any reference to Lerner in the name as a result of the litigation that was commenced. I do not think any of that is material, because it merely shows that without the knowledge of the plaintiff someone named Lerner carried on in a limited way stores under the name of Lerner-Vogue, and on plaintiff's complaint certain changes were made. There is no evidence that the presence of those stores caused the purchasing public on the Pacific Coast to identify the designation Lerner with any women's ready-to-wear stores other than the plaintiff's stores. So far as this case is concerned, I am not going to object to putting it in if the court feels it is material, provided in that event the facts are stated, and we have set them forth according to the record on page 3, beginning line 15 of our objections to the findings, that is, in place of the find-

ings as filed by the defendant; but if it is incorporated that the court in that event require the defendant to restate the finding in accordance with the record.

Now, in paragraph 3 of defendant's proposed findings there is a statement the general effect of which is that plaintiff relies entirely upon passing pedestrian traffic for its customers, and that its customers are made up almost entirely of traffic that happens to be passing the stores. That is not the fact, according to the record. It is true that locations are chosen by the plaintiff in those places where the largest amount of pedestrian traffic will pass, because that is the starting point of obtaining patronage, but the record is perfectly clear that the plaintiff has regular customers, people who having once patronized Lerner's patronize it regularly, and they come not only from San Francisco [20] and the immediate environs, as stated by the proposed finding, where a Lerner shop is situated, but including some persons from other areas throughout the United States and other places. We believe we are entitled, if we go into that, not only to make that statement which is true, but state it includes people from San Jose, as well as Palo Alto, Redwood City and peninsula areas, because there is not any dispute in the record on that fact. It came in in written form, and the defendant did not prove to the contrary.

Now, coming to the defendant, himself, there is no reference in the proposed findings as to the business of the defendant or the name under which he

did his business before he opened his store in San Jose, but there is a general proposed finding in paragraph 9 that except as found to be true in the proposed finding or as admitted by the pleadings, all of the allegations of the complaint are not true, and all the affirmative allegations of the answer are true. If that is accepted we then find that in the answer it is alleged that the defendant, before he went into this business, was in a business which was carried on under the name of L. G. Lerner and also under the name of Lerner's, and that it was a business in which he had contacted with the general public and customers who bought women's coats and suits that were manufactured by **that business**. That is completely contrary to the record. The record in this case, without any dispute, [21] is that that business was carried on under the name of L. G. Lerner, it was not carried on under any other name, as far as the defendant's own testimony is concerned, and it is also in the record that his business or contacts for that firm were with dealers, that is persons who in turn sold to the public and that the defendant, himself, had no contact with members of the public, so that he has not established any following or patronage or good will among customers of a retail store by means of the business he did with his father under the name of L. G. Lerner.

We have proposed a finding in paragraph 10 as to the nature of plaintiff's prior business, which was that he was associated with his father in the manufacture and wholesale to stores and dealers of women's coats and suits in San Francisco, and it

was under the name of L. G. Lerner. And that in addition there is no finding in the proposed findings to the effect that the defendant has admitted that he knew of its existence and nationally known reputation, and that he had been in their store in the Bay area and had been in their store in New York City. Defendant's proposed findings are completely silent on that point.

Then there is a proposed finding in paragraph 5 that since about June 1, 1944, the defendant has engaged in business in San Jose and has advertised his business as Lerner's, San Jose. That is not true. There is nothing in the record [22] that that business was advertised in the form that it appears there, "Lerner's San Jose." The ads which are attached to the complaint in this case and which the defendant admitted to be true copies, torn right out of the newspapers, say "Lerner's," and there is an address "70 South First Street, San Jose," but there is not any designation such as you would consider part of the name. The same is true of the next statement that he advertised his business as "Lerner's Apparel." That is completely misleading. Your Honor may recall from the sign on the door of the store that it is a large sign in a light background with the word "Lerner's," which is in script, in very small black letters, in the right-hand corner, is the word "Apparel." It seems to me that without explanation it would appear as if the defendant was doing business under the name of Lerner's Apparel. He is not doing business under the name of Lerner's Apparel, according to the

record, and according to the facts. He is now doing business as Wilfred Lerner, with a particular set-up for the word "Wilfred" in the lower left-hand corner in small letters, and "Lerner" emphasized in large letters. The word "Apparel" is on the lower right-hand corner of the sign. He advertises what he is selling, but he does not do business under the name of "Lerner's Apparel," and never has. We do not believe that is accurate, nor would it give any court a correct picture to accept that finding. [23]

Then follows paragraph 6, in which are given superlative statements that I do not believe have any place in the record; they are unsupported in the record. They are inaccurate. The statement is that the store operated by the defendant in San Jose is of a character and appearance so distinctive and different in every material respect from that of Lerner Shops, that no person of ordinary understanding and intelligence, no person exercising ordinary care and no ordinarily observant purchaser would confuse it with said "Lerner's Shops," or do business with defendant under the reasonable or foreseeable misapprehension that he was doing business with said "Lerner's Shops."

That, to my mind, is not a statement of the facts, at all. It is merely grouping and lumping into one statement the defendant's conclusion as to a number of facts, all of which are in the record. For one thing, there is not any dispute, in fact there is a stipulation of the record that the ranges in price are essentially the same in some classes of women's

wearing apparel of various kinds; in the second place, that the prices will not overlap so that while the plaintiff was lower on the bottom than the defendant and the defendant is higher than the top lines of plaintiff, nevertheless the defendant's range and the plaintiff's range overlap in the middle. The defendant admits that he does not sell all of this merchandise at the highest price of his price range. There are newspaper [24] ads that were presented to the defendant and the record shows that he offers for sale and sells merchandise at prices well above the plaintiff's range. But if you take a statement as broad and all-inclusive as this one proposed for finding it would appear that he is not even selling the same merchandise, let alone that he is not selling it at the price range that was competitive.

Then, of course, the statement that the defendant has performed no act or made any statement or resorted to any artifice which would confuse, mislead or deceive the public, I assume that the court took the defendant's view in so concluding, even though it is a fact he did open his business, advertise it as Lerner's without any identification of himself, and knowing the existence of the plaintiff and its stores, in his newspaper opening ads he did not even set forth the prices of what he was selling, nor did he indicate the quality of what he was selling, so that he was in effect telling the public in his newspaper ads that here was a business under the name of Lerner, which is well known to people, who purchase the kind of material that the defendant had for sale to them without telling them that it

was not Lerner's or Lerner's Shops. He stated that he subsequently made certain changes. He did not state that they were not made until after complaint was made, and that some of those changes were not made until just before trial; and as a matter of fact one change was [25] never made and still remains unmade, and that is in the entrance to this store; one of the pictures in the case shows it in detail, on the floor, with the word "Lerner", and that continues to the present date.

The Court: As I recall it, though, the word "Wilfred" was ahead of it.

Mr. Goldberg: No, not in the entrance. As you go into the store from the sidewalk, you find windows out to the sidewalk, and then there is an entrance before you get to the door, but as you walk in on the floor, in the tile or marble floor, set in, is the name "Lerner," and that was so at the time of the trial, according to the defendant's testimony and the picture in evidence, and continues to the present time.

The Court: I think if this were a case where a man set out to pirate your business that would be one thing, but there is certainly nothing in the evidence to substantiate that.

Mr. Goldberg: Your Honor will recall when the discussion came up in that connection the only question was as to the manner in which the name Wilfred would be added, and your Honor can see from the pictures in evidence that it still emphasizes the Lerner and subordinates everything else to it in a way that does not meet the requirements

where a person who has a certain name under which he wants to do business is permitted to continue.

The Court: I am familiar with, I have read all of those cases, but those are cases where there is a reason for requiring it, where there is definite unfair competition and the public was being misled and all of that sort of thing, but you have to have a foundation, have got to show that there is competition contrary to law, resulting in damages, and an intention to pirate the other man's business.

Mr. Goldberg: It was just decided a week ago by Judge St. Sure in the Moss case where the plaintiff corporation was doing business as Moss Stores. It was started by a man named Moss about 60 years ago, and subsequently was run by his son-in-law, who changed his name to Moss because he was running that business. At the present time there are no Moss persons with the plaintiff's store. The defendants began their business some years ago; their names were not Moss, but they changed it to Moss and they called their business the Moss Apparel Shops. In some places they had stores in the same area as the plaintiff, and in other places they were even in a different county from the plaintiff. The court held that they were entitled, under the circumstances, to continue to use the name Moss, but they could use it only as a part of their full name, "Moss Apparel Shops," and would have to always use it in the same size and do nothing to emphasize "Moss" as against the balance of their name. That is a rule that has been applied in all the cases that I have found. [27]

The Court: I have no doubt about that, where confusion is shown. I do not think there is very much question about the law; I do not take issue with you on the law, but I do not think you have a case here under those principles of law for the court to grant an injunction. I think the reason this was brought about was that you were trying to exact the extreme penalty. The use of the man's first name was something he might not even have been required to do, but having done so, I do not see any cause for complaint on the part of your client.

Mr. Goldberg: This is the situation. If we have no cause of action at all then we are not entitled to have him use his first name or anything else. Our view of an adjustment was on the theory that we did have a cause of action, and that if it does not go to the extent of requiring that he not use the name Lerner at all, then at least by way of adjustment it should go to the extent of there being no possibility or probability of mistake that Wilfred Lerner is doing business as Lerner's. It was not on that feature that we finally failed to agree, but when your Honor states that you believe that——

Mr. Robinson: If you are going to state your interpretation then I am going to state mine.

The Court: Let us not go into that.

Mr. Goldberg: The plaintiff is not trying to exact an extreme remedy, because we believe that if there was an adjustment on the basis of a change in name we should have that remedy [28] which the court has usually awarded where the defendant was permitted to use his name with a proper change

so as not to be confusing, and that is the reason that we did not in our view of it make an adjustment.

The Court: Wouldn't that be all that the court could properly do in this case if you won the case, so that it would avoid any confusion? Would there have been anything else a court in equity could do?

Mr. Goldberg: Yes.

The Court: What else?

Mr. Goldberg: I don't know what the court would do in our particular case.

The Court: I am asking under the law in all of these cases in which the court has granted or allowed plaintiff relief and has required that changes be made, would a court in equity be justified in doing anything more than that?

Mr. Goldberg: There are some cases where the courts have prevented completely the use of names.

The Court: They are cases where piracy is very evident. But in cases where two stores are concerned, where the facts would be readily comparable to the facts in this case, where the courts ever did anything more than require the distinctive marking of the business.

Mr. Goldberg: I could not give your Honor any case.

The Court: I do not think I have read any.

Mr. Goldberg: In the case which I called to your Honor's and counsel's attention following the trial, *Brooks Bros. vs. Brooks Clothing of California, Limited*—

The Court: I read that case.

Mr. Goldberg: In that case there was a man by the name of Brooks who started his business back in 1920, and so therefore had been conducting it for 25 years. The case was decided this year. The defendant had built up a chain of 15 stores throughout the state. The court found that there had been a certain amount of delay, laches on the part of the plaintiff in pursuing his remedy, and for that reason denied damages, but nevertheless granted an injunction, and the court ordered the defendant to eliminate completely the name Brooks, or any reference to the name Brooks, although it used it for fourteen years, and although, as far as plaintiff is concerned, the plaintiff never had a store in California, but had sent representatives out here from time to time who stayed at the St. Francis Hotel. In 1939, almost 20 years after the plaintiff had begun its business and had a number of stores they opened a sales representative office in Los Angeles and in San Francisco. That is all they ever had in California. The defendant, on the other hand, had a store in San Jose, San Diego, Santa Barbara, just as far away, if not more, from the sales representatives office as is San Jose from San Francisco, but nevertheless the court prohibited the use [30] of the name Brooks at any of those places.

The Court: Take the case we have here, would the court be justified in equity in doing anything more than requiring the defendant to designate his store as Wilfred Lerner's store?

Mr. Goldberg: I would say if the Court found

that the original use of the name Lerner in the opening of the store and the advertising of it was in good faith, which we believe had a more sinister purpose, I think the court in the ordinary view of this case could require a change in name instead of the elimination of the name "Lerner," but under the circumstances I think the court should follow the view of the many cases cited in our brief as to how the change should be effected.

The Court: Take this case, I don't want to interrupt you too much, because you have your clients' interest in mind, but in good conscience under the facts of this case, with this man Wilfred Lerner running a store down at San Jose, would the Court, if you won this case, be required to do anything more than require the full name of Wilfred Lerner on the sign? I don't think you could ask the court to do anything more than that. It would be completely against my conscience to do it. If the court did that it would require that anyone who would be similarly situated to the defendant in this case go out of business or change his [31] name entirely. We still have to decide the case on the facts and the law that has been built up. I think I have a fair idea of it, maybe not as much as you, because you have studied into it a little more, but I can see the philosophy or the reason for it, that a business that has been built up over a period of years should not be pirated. I generally am familiar with the law. In this case it seems to me that although this is a discussion that properly should only come up on a motion for new trial, all that the court could do

in a case like this would be, if you won the case, to require the defendant to put his first name on there.

Mr. Goldberg: I am perfectly willing to do this, if the Court should find that the manner in which the defendant commenced its business and advertised it, and the manner in which he used that name was done in good faith, if the Court found that, then I would say that we would not expect the court in that event to go beyond requiring an identification to prevent confusion. But I think that is the least that we have made out in this case, that the defendant should be required to identify his business by his given name and to do it in such a manner that he did not emphasize or over-shadow the first name with the name Lerner.

The Court: I do not think that the evidence showed any purpose of unfair competition in the conduct of this business. [32]

Mr. Goldberg: The purpose would not be material.

The Court: Intent. Just a moment ago you said you felt that the evidence showed that there was some purpose of unfair competition in starting out business, in the way he advertised it, and that that might justify even more than a change in the name.

Mr. Goldberg: That is true.

The Court: As I say, I could not see any evidence, anything that would justify the claim that there was any sinister purpose in starting the business, as I recall the testimony. You might think that in a man's mind, somewhere in his mind he

figured out there is a store, Lerner has a store in San Francisco, and his name is pretty well known over the country, and I am pretty lucky I have got the same name, I am going to open a shop down here in San Jose, and as my name is the same that is a pretty good idea, I can get the benefit of the name. But there is nothing in the evidence about that to lead the court to conclude that.

Mr. Goldberg: We have the evidence in the case that supports the fact that that is the manner in which he ran his store. That was all argued to the court.

The Court: Yes.

Mr. Goldberg: I am not planning to reargue that, but in our original complaint here in which we sought a full injunction, we did feel in spite of the fact that we could not get the [33] defendant to admit it, that when he started out with Lerner he had in mind the nation-wide reputation of plaintiff, and that he put that sign up in order to get customers from the surrounding area and thought it would give him a head start in his new business, but assuming that the court does not accept that and the court feels that it is not required by the evidence to come to that conclusion, nevertheless we do feel that the court is required to come to the conclusion that whether it was in large amount or whether it was in a small amount, there is competition between these parties; they are trading in an area where there is shopping between the two companies, competing for business, even though it is not the principal business of the Bay area for which

they are competing and for only, say, a small amount, but there is every reason why there should be confusion when plaintiff's name is so well known and the defendant has only just started.

The Court: Suppose, carrying out that theory, the business was a grocery business, and that Goldberg-Bowen had some clients of the store, and there was a store at the same place that Lerner advertised his store, and that was operated by a man by the name of Goldberg-Bowen instead of, say, a store selling stationery and partly groceries, that the stationery business was five thousand a month and only three hundred or four hundred a month in groceries, the same type of commodities, groceries that were sold by Goldberg-Bowen, [34] here, and there might be said to be unfair competition, as you put it a moment ago, would you say that Goldberg-Bowen there had to change their name of doing business?

Mr. Goldberg: I think the courts say that the rule of minimus does not apply in those cases, and they would have to change to such an extent as to differentiate their company from that of the plaintiff. I do not see that there is any hardship there. If a newcomer is trying to do business, he is trying to build his business by what he is going to do and not by what somebody has done before him. He is just as likely to do a good business as Wilfred Lerner in ladies' wearing apparel as he is.

The Court: I don't know, I am not sure. I think this man was carrying on some different kind of business in San Jose and that was his name, and

Lerner is really a little easier to say than Wilfred Lerner.

Mr. Goldberg: But at least he would be showing his good faith if he used his full name.

The Court: He offered to do that, and if I were going to make a finding on that I would say that was sufficient under the facts of this case to satisfy any requirement of the law.

Mr. Goldberg: I think we either have no remedy or we are entitled at least to the remedy which the courts have allowed in these cases where a differentiation is required, and I think the cases are uniform. [35]

The Court: I think under the facts of this case, as I recall the photographs that were submitted to me, that was more than ample, and that is why I was surprised we had to go to trial and try this case. As I recall it, he showed photographs with the name Wilfred on them. Of course, that might not satisfy the particular requirements or some standard that the plaintiff wanted, but looking at it as an impartial third person it would seem to me to be sufficient, and that is why I could not understand why you had to go and litigate this matter.

Mr. Goldberg: Of course, those changes were not proposed, in other words, they were just practically to the contrary.

Mr. Robinson: That is not correct.

Mr. Goldberg: We had to go to litigation.

Mr. Robinson: If I may make a statement, your Honor, the changes were made in accordance with your Honor's suggestion after the pre-trial. I

might say while I am on my feet and since Mr. Goldberg has brought in the negotiations for settlement, I may point out that the plaintiff's real grievance here is not that Lerner is doing business under the name of Wilfred Lerner, but the grievance is that he is doing business under any circumstances under the name Lerner. The complaint is drawn entirely on that theory and they have shifted grounds and they are trying to show a case of unfair competition.

The Court: Suppose you continue, Mr. Goldberg. [36]

Mr. Goldberg: I think so far as pointing out inaccuracies in the defendant's proposed findings that I indicated those, and I think that to the extent the proposed findings of the plaintiff embody those findings, though they are proposed findings on certain issues as to which the court has indicated it would not find if proposed by plaintiff, but I think that only applies to an occasional statement in the findings as proposed by the plaintiff, such as the matter pointed out by the court—"There is uncontradicted evidence that defendant's conduct did cause confusion of prospective customers and damage to plaintiff"—the court suggested that it would not accept the finding on that subject, while I am not trying to argue at this time what is in the record, or that the court should accept it, but I do think that as far as our proposed findings are concerned, except for matters of that kind, that they are purely factual and they are certainly based on the record. We could offer amendments say "strike

out paragraph 2 and substitute the following," and so on—we think that the proposed findings should be included as a whole, not because we expect the court by reason of these proposed findings to change its conclusion as to the result, but merely to incorporate findings of fact which we feel, and we put in the transcript references for that purpose, fully explain the findings as proposed, whether or not they lead to the conclusion which the plaintiff seeks.

I do not know what the court's plan of procedure from this point might be. If we knew, for instance, what part of these proposed amendments are not acceptable to the court we should be glad to strike them out or redraw them, and perhaps counsel for defendant, having had these for some time, would point out those parts of our proposals which are inaccurate—although I do not believe that is so—or at least inaccurate to the extent that the court is not willing to accept the findings on that subject. We tried to follow the transcript, and I read it over carefully for that very purpose. But other than that I think I have pointed out to the court the inaccuracies in the findings, first in that they have certain omissions, and secondly,—

The Court: I think perhaps it might be better if I just went over those, myself. They are all in writing. There are some things I am not going to spend much time on. I notice in paragraph 15 on page 10 you state they are in competition and plaintiff has been damaged and will continue to be damaged. I can't put that in the finding and give judgment for the defendant. I think perhaps I might

just as well go over them, myself. I understand generally what your theory is in proposing these amendments.

Mr. Goldberg: I might say the theory at this point is not to ask the court to change its decision; that is not the purpose of these findings; but rather to point out inaccuracies [39] in the proposed findings of defendant and to obtain inclusion of material facts where we do not think that either side questions those facts. There is one matter further that I want to refer to, and that is on the last page of the proposed findings of the defendant. That would lead to a very serious inaccuracies if accepted by the court.

The Court: You mean what part?

Mr. Goldberg: "All the affirmative allegations of the answer are true." I only indicate that, but there are a number of statements I want to point out to the court in the answer as to which there is no testimony at all in the record, or the testimony is to the contrary. I do not think that it calls for that kind of a finding.

In addition I think that with respect to paragraph 8, just immediately preceding it states "the change of name of said Delaware corporation, prior to said adjudication in bankruptcy, did not and does not comprise a fraud upon the public." The defendant sets forth as a third defense this happened back in 1932, when the assets and good will were transferred to plaintiff corporation, and to a company by the name of Lerner which changed the name from Lerner Stores Corporation to Realty

Corporation and went into bankruptcy. The answer to that effect did not constitute a defense.

The Court: I don't consider it necessary to make a finding on that.

Mr. Robinson: That finding is in favor of the plaintiff.

Mr. Goldberg: I don't think it is favorable to it.

Mr. Robinson: It was not substantiated and we made a finding in favor of the plaintiff.

The Court: The court won't make a finding on that.

Mr. Goldberg: I would suggest paragraph 17 of our proposed findings, that the said defense alleged in defendant's answer is not true.

Mr. Robinson: There is no difference between what I said and what you have said.

The Court: Let us proceed.

Mr. Goldberg: The only other matter I want to mention is in going through this transcript I noticed some evident errors in the transcript and I don't know what is the proper procedure. We could make a copy of those and furnish them to the reporter and counsel.

Mr. Robinson: I think the proper time would be on the record on appeal.

Mr. Goldberg: There are a couple of inaccuracies we noticed which may be the same ones you have noticed.

Mr. Goldberg: I was going to suggest that I had an original and copy and I could leave the

original with the court during the pendency of this matter.

The Court: I think I had better go over this.

Mr. Robinson: I think Mr. Goldberg has been rather vigorous in his talk on these findings. He indicated that there seemed a lack of good faith; he said many times such and such was without dispute in the evidence, and the finding was directly to the contrary. Now, this is a sample of how much council is in error. I would merely say he exaggerated and took us to task for saying that when Mr. Lerner, the defendant, opened his business down there he opened under the name of Lerner's, as well as Lerner's Apparel, and Lerner's, San Jose. He said of course the advertising read that way. He said anyone in his right mind could have assumed that that advertising could be read as Lerner's, Lerner Apparel, and Lerner's San Jose. We find precisely that allegation on page 5 of the complaint, line 22, and this is the plaintiff speaking, not the defendant speaking, with malice in his heart and intention to injure the defendant and get this court to make an incorrect finding, and this plaintiff is not trying to lay before the court the set of findings upon which he seeks relief, and here is what he says, now changing his position:

"Since June 1, 1944, defendant has engaged at San Jose in the conduct of said retail store for the sale of women's apparel at low prices under the name of Lerner's and Lerner Apparel, and defendant has continuously and prominently advertised and represented his [41] business as Lerner's, San Jose."

That comes from plaintiff's own complaint. Now he does not hesitate to take us to task and say that the very thing that he wants to be accurate is inaccurate when we make the same conclusion. Plaintiff endeavored also to make a point of the fact that the two price sales overlapped, and he says that is not an issue in this case. He made the point that the defendant was engaged in the conduct of said retail stores for the sale of women's apparel at low prices. There was a good deal of evidence introduced here to the effect that we were not engaged in the low-price business, and that while the two prices did overlap we were in different forms of business. I do not think that is particularly material to the case but since plaintiff made so much of it we should not be criticized for making a finding upon the issue which was presented by the plaintiff and which will undoubtedly urge if he gets the opportunity in another forum.

In reciting the corporate history, I think that goes far back enough to begin the corporate history of this company; it is unnecessary, but since plaintiff stresses it so much, I think when we begin the plaintiff's corporate history fourteen years before the suit was filed that goes far enough back to establish good will; we are not disputing that they have a good will, and when we set forth the corporate [42] history it follows the record very carefully. And when the plaintiff sets forth what he says is the corporate history he sets it forth in the most general, vague and ambiguous terms, giving the impression that perhaps the entire State of California

is covered like the road twists on Mokelumne Meadows, and as far as the corporate history is concerned they have given in great detail the development of stores, and it is on the basis of that finding they wish to present the issue to the Appellate Court as to whether that gives them that premature right in San Jose. They also go so far in giving the corporate history as to include a branch in Fresno, which was not in existence at the time this litigation was commenced, or even when the lawsuit was filed. It was opened after the lawsuit was filed. So I think that since Mr. Goldberg has taken the liberty to say in so many instances that it is contrary to the record, that the record is undisputed, and the findings are contrary to the record, that I should point out that Mr. Goldberg is not infallible.

Now, with respect to the L. G. Lerner Vogue situation, Mr. Goldberg mentioned some things today which were quite a revelation to me because they were never mentioned before. I am sure that Mr. Goldberg was not back east in that litigation between Lerner and L. G. Lerner Vogue, so he must have gotten the information from Mr. Magee. If he did, Mr. [43] Magee was more frank with him than he was with me or the court. Your Honor will remember he did not know on the stand in what cities J. S. Lerner Vogue were before plaintiff, whether plaintiff started a store in Kansas City first and J. S. Lerner Vogue came in later in a city fifty miles away; he couldn't even remember that; and here they are complaining that if they are in a city fifty miles away the defendant can't come in. He didn't

know the time the plaintiff came in Topeka, which is fifty miles from Kansas City where J. S. Lerner Vogue has four stores. Mr. Goldberg knows the facts and Mr. Magee did not know them. We therefore have a finding indicating who came in first and we have a finding which comes directly from the testimony of Mr. Magee in my opinion unwarranted that there is a store within less than one hundred miles from the store operated by plaintiff.

The Court: What has that got to do with the case?

Mr. Robinson: Because Mr. Goldberg insists this morning that this court should insert a finding that nowhere else in California is there a store using the word Lerner and they are the one that should receive this concession. They want your Honor to make a finding that there is no other store under the name Lerner but they do not want the court to find that in other parts of the country they themselves are doing the very thing that they object to in California.

As to the Brooks case, your Honor said you had read it. [44] I might say that judgment has not been entered yet.

Mr. Goldberg: An order was made, of which I have a copy.

The Court: Is it on appeal?

Mr. Robinson: No, it has not been entered in the upper court.

I would like to refer your Honor to the case of Griesedick Western Brewery Co. vs. People Brew-

ing Company. It is a products case. It is a case which came out since our case was tried.

The Court: What is the citation?

Mr. Robinson: 149 Federal Second, 1019. The decision was rendered on June 20, 1945 and its appearance in the Advance Sheets will be about the 29th of October. I might say that in preparing the findings I tried as near as possible to use that language that the court had indicated was applicable particularly in connection with competition or lack of competition between two areas, and if your Honor will refer to the findings that we set forth in full you will observe that the findings in this case are full, fair, complete and accurate.

Mr. Goldberg: There is nothing in the proposed findings of the defendant that the plaintiff had ever thought of doing any business in San Jose.

Mr. Robinson: That is absolutely incorrect, and I refer you to page——

The Court: This is not helping me at all. I have got [45] enough to do without that. If I cannot make satisfactory progress in the way of amending the findings I will draw my own findings. As a matter of fact most of the judges do that anyhow. If I had thought it was going to involve all this argument I would have drawn my own findings in the matter. You gentlemen have had this matter of findings, if I remember rightly, under consideration for months and judgment should be entered. I think very simple findings would cover it.

Mr. Goldberg: Might I refer for a moment to the case that counsel has called attention to. Neither

the plaintiff or the defendant had ever done business in the same state; the closest places where they had done business were 500 miles apart and not in the same state; that the defendant had its business within an area of 150 miles of Duluth, Minnesota, and plaintiff had never entered into the state of Minnesota. One of the findings of the trial court was "that plaintiff had made no plans to enter the Duluth trade territory, or the State of Minnesota, or the states of Wisconsin, Michigan, North Dakota or South Dakota for the advertisement and sale of its 'Stag' beer and has taken no steps to enter such territory, has made no investments, and has done nothing looking toward the extension of its trade into such trade territory."

That was one of the findings quoted in the opinion of the lower court which was affirmed. I did not call this case [46] to the attention of the court, but since counsel has, it is obvious that the trial court in this case and the Circuit Court held that no steps had been taken to enter this trade territory, whereas in our case, although the proposed finding says that a lease was taken, it goes on to say that "at the time of the commencement of this action said premises were occupied by a subtenant of said California corporation and were not being used by plaintiff or any of its subsidiaries for the purpose of conducting therein a retail ladies ready-to-wear store in any manner whatsoever." That leaves the idea that the plaintiff merely took the lease with the idea that some time in the future it might or might not occupy the premises, whereas the evidence shows and it ap-

pears from the lease that when the lease was taken the term was to commence July 1, 1942, and that as a part of the obligation of the plaintiff in taking the lease it was required to construct a new building on the leased premises and to conduct one of its stores therein. The only reason that the plaintiff had not gone into the store on July 1, 1942, was that by that time the restrictions of the War Production Board prevented reconstruction and therefore they were continuing to sublet until such time as the reconstruction of the premises could be accomplished. It seems to me now that you have a complete statement.

The Court: I will take the matter under submission. [47]

REPORTER'S TRANSCRIPT ON MOTION FOR NEW TRIAL

Monday, January 21, 1946

Counsel Appearing: For Plaintiff: John J. Goldberg, Esq., Sam A. Ladar, Esq. For Defendant: Henry W. Robinson, Esq.

The Court: Are you ready to argue this motion for a new trial?

Mr. Goldberg: Yes, your Honor.

Mr. Robinson: Ready.

Mr. Goldberg: May it please the Court, this is the motion of the plaintiff, Lerner Stores Corporation, for a new trial on the grounds stated in the

* Page numbering appearing at top of page of original Reporter's Transcript.

notice of motion that has been filed and which is based on our contention that the evidence is insufficient to justify the decision and that the decision is against law.

I want to say first that we realize that we have taken a great deal of the time of the court in presenting this same matter on a number of separate occasions. We appreciate the patience of the court in hearing us, but we do feel that this is a matter of very substantial importance to the plaintiff, of much more importance to the plaintiff than to the defendant, for, although the plaintiff is a large corporation, judged by its substantial business, nevertheless all of that is wrapped up in the name which is used to conduct the business, and injury to it in the use of its name. It may well be an injury that will go far beyond that which could possibly benefit the defendant in the conduct of its business, while on the other hand there is no reason why there should be any injury done to the business of the defendant, whether that business is carried on under a particular designation by the new business which could have been started under a different name than its own name, but even though carried on in its own name, whether that be his surname alone, or whether the surname with such qualifications that the court believes would protect him and also the plaintiff, nevertheless no injury to the business of the defendant would result. Now, for this reason the plaintiff feels that the issue here goes far beyond any matter of determining the ex-

tent to which, if any, [2] the defendant might be concerned in being required to either not use the name qualified or use his own name so as to protect the plaintiff.

In the pre-trial conference the attention of the court was called to cases which we feel held quite uniformly that a business which is in the nature of an expanding business, one which has a history that it does expand its activities into various areas is entitled to be protected in the use of its name and in its good will, not only in a particular community or communities in which it has established its place of business, but also in those additional outlying areas which constitute the area for the normal expansion of its business, and at that time the court stated that if such be the law at least the plaintiff would have to bear a heavy burden of proof to establish the facts which would entitle it to have the benefit of such a principle of law.

We feel that in this case the facts—not those on which there has been any conflict, and on which the court might and should exercise its judgment as to where the truth lies, but on those facts as to which there is no dispute, some of which appear from the findings which the court has now signed and some of which are omitted from those findings, we believe that those undisputed facts entitle the plaintiff to relief under a course of decisions that we believe is uniform and without break. [3]

I am not going to discuss the evidence, but I would like to state in a few simple statements those facts which I have listed, which I believe, and which I

am quite sure it is so, are in the record without dispute. As a matter of fact, I think there is very little dispute on any of the facts on this case, but as to those which are in dispute I believe the only relevancy of them is as to the nature and extent of the relief which a court would feel that plaintiff is entitled to have, and not with respect to whether the plaintiff is entitled to some relief.

Those facts I believe are the following: That the plaintiff's business of operating a chain of retail stores for the sale of ladies' wearing apparel was started in 1919, which is not the date referred to in the findings; the findings refer to 1930 as the earliest date and do not state that that happened to be the date when the plaintiff's business was commenced in California. So that particular finding, it might be well assumed, because there is nothing to the contrary therein, that the business was started in 1930. It was started in 1929 by Samuel Lerner and his two brothers, and they have continued actively interested in that business to the present time, themselves, and into the second generation. That business, as a matter of plan, policy and of actual practice, has been expanded over the United States, and throughout the country, so that when this action was commenced there [4] were approximately 180 stores in 41 States and in the District of Columbia. That expansion reached California in 1930 and resulted in the establishment and operation in this State, before the defendant opened his store of thirteen stores, of which one in Los An-

geles was closed in 1942 because of inability to renew expired lease.

Of the California stores, two are in San Francisco, and one is in Oakland. The plaintiff operated the same as all other chain store organizations; upon first entering a State or area it established itself in the most populous part of that area, and after building up a business in a particular city and from the district area, to use that patronage from the surrounding communities as the nucleus of a new store in one or more of the smaller communities in the surrounding area. In line with this policy as respects the San Francisco Bay area, the plaintiff opened its San Francisco and Oakland stores in 1934 and 1935, and in 1941 the plaintiff negotiated a lease of a store in San Jose, the term of which was to commence on July 1, 1942, when the existing tenants' lease expired. Under the lease the plaintiff was obligated to rebuild the premises and then to occupy the major portion of it, being permitted to sublet on a tenancy of 35 feet frontage, and was obligated to conduct in the premises one of its regular stores. Because of the war and Government building restrictions which intervened, plaintiff was unable to do the necessary rebuilding. [5] and had to wait until the restrictions were lifted before it can plan to occupy the San Jose store.

In line with this same policy of expanding into the outlying areas surrounding its stores in large communities, the plaintiff, before the defendant had opened his store in San Jose, had leased in California fourteen additional locations for the establish-

ment of new stores, including three on the San Francisco peninsula, at Palo Alto, San Mateo and Burlingame, and this in addition to the San Jose store.

Over a period of 25 years or more, since 1919, the plaintiff has built up a very valuable and profitable business and good will. I won't go into the figures, but the court may recall that they are quite substantial. It is the largest in the same kind of business in the world. They sell to many millions of customers each year, located all over the United States.

Although the plaintiff designates its stores as Lerner Shops, most of its customers and the public know of and refer to the plaintiff and its business as Lerner's.

Each of the plaintiff's three stores in San Francisco and Oakland—there is no dispute on this, and I do not think it is subject to any qualification from the record—regularly do a substantial amount of business with customers living on the San Francisco peninsula, including San Jose, Palo Alto, Redwood City and other peninsular communities. [6]

Because the plaintiff does a cash business, it does not have a list of the names and addresses of the customers. However, customers sometimes pay by check drawn on a bank where he lives, thereby showing the locality, or if a customer wants to exchange merchandise or turn it in to credit, or buy merchandise and pay for it on a so-called lay-away plan, in those cases the customer signs a slip and gives the address. And sometimes in addition to that customers who have been coming into the store frequently enter into a conversation with sales peo-

ple which indicates or discloses where such customer lives. From those various sources and from the specific records which the customer on some occasion signs, as those mentioned, and which records were in court during the trial, plaintiff has established that it has a definite regular patronage in San Jose and in the surrounding areas.

The Court: Is there any finding as to the extent of the business in San Jose area?

Mr. Goldberg: There is no finding. The closest finding is that plaintiff gets most of its business, or primarily gets its business from San Francisco, that it gets some business from other parts of the United States. I am looking for it in the findings. It says: "The customers of said Lerner Shops consist in substantial part of persons who comprise the pedestrian traffic passing the respective stores, consisting in each instance, principally of persons from within [7] the city and its immediate environs where a Lerner Shop is situated, but including some persons from other areas throughout the United States and other places."

That is the only finding on that subject.

On June 1, 1944, at which time all of the facts above stated were in existence, the defendant opened a store in San Jose for the retail sale of ladies' wearing apparel, calling the store "Lerner's." The defendant's name is Wilfred A. Lerner. He had never been in business in San Jose, and he had never before been in any business or connected with any business which was carried on under the name of "Lerner," before he opened the business.

As soon as the plaintiff learned of the conduct of the defendant after the opening of the store, the plaintiff asked the defendant to cease using the name "Lerner." The defendant refused. Before the trial the defendant made certain changes in the denomination of its business, which plaintiff considered insufficient for its protection and inadequate under the law, and since the defendant insists on its right to use the name "Lerner" without qualification, we need not at this time, unless the court desires it, consider the adequacy of the changes which the defendant has made in its denomination.

The plaintiff and the defendant handle in general the same classes of merchandise. Their price ranges overlap. The defendant does business with people in Palo Alto, Redwood City [8] and the area surrounding San Jose, as well as with people who live in San Jose. The plaintiff first heard of the defendant's store as being in San Jose and being denominated under the name of Lerner from customers of the plaintiff who thought that it was the plaintiff's store, and from time to time customers in each of the plaintiff's bay area stores have referred to the defendant's store in San Jose as the plaintiff's store. The defendant has himself testified that persons coming into his store have about once or twice a month asked him if he was related to people who have the store in San Francisco.

Now, all of those facts are merely those which are in the record. They were not questioned. There is nothing in the record to the contrary, and I do not believe there is any room in the record for any gen-

eral inference to the contrary as to those particular facts.

I am not referring to a number of other facts, such as whether the defendant, when he opened his store as Lerner's had any ulterior motive to benefit from the reputation and good will of the plaintiff, although some courts on appeal have stated that regardless of the facts submitted to the contrary they were not going to believe it. I am not going into that, because it is not material to the point I am desirous of making on this motion. I am not going into the question of whether the kind of advertising which the defendant [9] indulged in before he opened his store and the fact that he used the name as he did after he had been asked not to, indicate anything more than that the defendant in good faith attempted to exercise a right to which he is entitled. But granting all of that, those are not in the controversy, if the court draws any conclusions which are contrary to those which the plaintiff feels should be drawn, nevertheless on the facts recited we feel under the authorities on this subject the plaintiff is entitled to relief.

We have presented to the court at the first pre-trial conference cases which we feel have passed on this type of situation, that is, those cases where the parties were doing business in areas removed from each other, varying distances, some in different States and some in different cities, and in which the court found that plaintiff's business was such that it was expanding its operations in which it would normally reach certain areas within a cer-

tain time; some cases, such as the Sweet Sixteen cases, where the plaintiff had actually negotiated for a lease in Salt Lake City, although its nearest store was San Francisco——

The Court: Mr. Goldberg, I realize you have quoted all of those authorities, but what bothers me about the case and the reason why I decided it the way I did, was the application of the law to the facts of this particular case.

Mr. Goldberg: I realize that. [10]

The Court: I have not any quarrel with the line of decisions that you have cited. They covered situations in an area where, if the evidence showed that someone came into a place, even though there was not a store of the plaintiff nearby, and the facts indicated that the store, consciously or unconsciously, was for the purpose of or had the effect of pirating good will, then, of course, the plaintiff was entitled to relief; but as I understand the philosophy of those decisions where there is an expanding business, where there is a good will developed, where it means something, and then someone comes into an area and the result of it is that there is piracy or stealing of that good will, either consciously or unconsciously, then the patent rights with respect to that may be enforced. But the question involved in this case is not whether the law is as you state it, as I see it, but whether or not there was any such as you have named in this case. I just want to make that clear, because we have had some discussion in connection with this matter, and I rather got the feeling that you felt that the court was not

giving a consideration to those principles of law which you had set up. I thought I might state that now so that you won't misunderstand what I did. That is why I interrupted you.

Mr. Goldberg: The question is whether the effect of what he has done or probably will causes damage to the plaintiff. [11]

The Court: I realize that is the case, but I felt on the fact it did not have the effect which was pointed out in the decisions.

Mr. Goldberg: The facts I believe established without any possibility of question that the plaintiff has a patronage in San Jose as well as in Palo Alto, and Redwood City, which are areas tributary to San Jose as well as San Francisco.

The Court: Let me say this to you, so that if you can clear up my mind you will have a chance to do so, but I felt from the evidence that there was not any substance whatsoever to that contention in the facts of the case. It may be that the record shows there were some customers, but I felt in truth and in fact that was not a substantial matter. The argument that good will attaches itself over all areas that might reasonably be the basis of affecting the property right of good will would be negated by the fact that over a period of time a certain area is left untouched by the plaintiff company because they did not attach enough substance to the business that might be developed in that area, and hence they leave it alone. Now, you have a factual situation there. It seems to me from the evidence that there was not any substance to it, at all, that there was

not any business or good will that was attached to what [12] the plaintiff's store in San Francisco would get out of this particular area down in San Jose, and therefore there was not any effect upon, or substantial effect upon the plaintiff's property right, even assuming that the acts of the defendant were violative of that property right.

Mr. Goldberg: There is this in the record without possible question, and that is that the plaintiff was considering San Jose as an area in which it did enough business that it should have a store there, because in the first place, as Mr. McGee explained on the witness stand, and he said it was in line with the practice of every chain organization, and that is they first established themselves in a central area and later branched out into the outlying area as they found that they had established a nucleus of patronage for a particular outlying area, and they felt that by 1941 that had been established because that is the time they negotiated this lease and actually entered into it for a term that was to commence July 1, 1942, because of the existing tenancy, which would not expire until July 1, 1942, and it was only the interruption of the war that created the fact that there was no store of plaintiff in San Jose when the defendant opened his store.

We do not say that merely because the plaintiff had just decided to come out from New York and start somewhere on the Pacific Coast and hit San Jose as a place, or had taken a [13] lease there but had not opened a store, precluded the defendant from opening and starting there, but we say that

the conduct of plaintiff is consistent only with its policy and the facts involved in the record that it was doing business in San Jose, and that it was going to open a store in San Jose and would have opened it, because it did have patronage in San Jose.

That is only one phase of the evidence on that subject. The other evidence the record evidence which was brought into court and was offered in evidence, and at the suggestion of the court it was covered by stipulation of counsel instead of covering up the record, that the actual papers signed by customers and showing their addresses, who had either made exchanges or returns for credit, and had given their addresses at Palo Alto, Redwood City and other places, and the testimony of the managers of the San Francisco stores was that over a period which appeared from their records that approximately 6 to 7 per cent of their transactions resulted in either exchanges or returns for credit, on the basis of which the evidence which it was stipulated would appear from those records would show that there would be approximately 240 or 250 transactions in San Jose alone, in the year out of the one San Francisco store on Market Street; and there would be some 560 odd transactions between that store and the residents of Palo Alto, to say nothing of Oakland and the other store [14] on Grant Avenue.

There have been cases such as the R. H. Macy case, where Macy has come out of New York, where it has a department store, and it has one also in

Miami, Florida, and people in Tulsa, Oklahoma, and Denver, Colorado, were enjoined from doing business there under the name of Macy, and where the proof as to competition was as to the amount of business done by Macy in a particular area. In the Denver case it appears that in the preceding year Macy had made 428 shipments into the State of Colorado. It does not say how large or how small the shipments were, but that was made a basis for showing that Macy was doing business in Colorado. In the Tulsa case it appeared that Macy had done—this was a women's apparel store—it had done approximately \$5000 worth of business in the preceding year. If we take these various transactions that have been testified to and which follow from the records, it seems to me that the plaintiff in this case——

The Court: Was merchandise shipped by Macy to those places?

Mr. Goldberg: Yes. They had no place of business closer than New York or Miami Beach.

The Court: There is no evidence in this case that the plaintiff was shipping any merchandise to San Jose?

Mr. Goldberg: No, the evidence is that people living in San Jose came to San Francisco and purchased.

The Court: I think the theory of those cases that you [15] refer to is that people would send in orders to Macy's, like they would to Montgomery-Ward, or any of the other large companies. I have read several of those cases.

Mr. Goldberg: This established the fact that Macy was doing business there, and I believe that the records in this case establishes equally that they were doing business with people from that area, and there is testimony in the record that there is a regular flow of business up and down the peninsula into San Francisco by people coming from those areas, and even though the plaintiff had opened a store in San Jose, it would still expect to do some business with people from San Jose who would come up thinking that in a large store they might have a larger selection, but in the main the nucleus which was established in San Jose would become remaining patronage for its San Jose store. But it seems to me that a company which has a nationwide distribution of its places of business, and which has thirty million transactions in a year preceding the commencement of the action, of necessity has established its name in many places other than where the defendant had its place of business and if in addition it can show, as here, it has a regular flow of patronage from this place, people who come here for that purpose, and there is evidence in addition that some of the people living in San Jose refer it to the opening of the plaintiff's store in San Jose, and without any doubt if such persons thought that [16] the defendant's store was the store of the plaintiff they would patronize the defendant's store to the damage of the plaintiff, and even if they did not patronize it, if there was anything different from the regular store operations of the plaintiff in the nature of merchandise it

might well reflect prejudicially on the plaintiff, and it seems to us the plaintiff is rightfully entitled at least to some effective differentiation between the defendant's business and the plaintiff.

Of course, in California there have been cases where the question of distance between the established retail prices of the parties would not prevent the giving of relief to the plaintiff, such as the Benioff case, where one party, the plaintiff, had a store in San Francisco, and the defendant opened his store in Los Angeles, and the evidence showed that the plaintiff was doing business in various parts of the State, including Los Angeles, and the court held that it was entitled to prevent the defendant from opening its store in the same line of business, retail sale of furs, in Los Angeles. We have the cases cited in our memorandum.

The Court: Do not those cases center around the use of the name?

Mr. Goldberg: I do not understand.

The Court: I had one of the cases in the Benioff litigation. [17]

Mr. Goldberg: That was different. They were not using the name of Benioff down there. The name involved was Hudson Bay Fur Company, which was being used by George Benioff in San Francisco at that time, which is not the name he uses now, and David and Fred Benioff, the defendant, had opened a store in Los Angeles under the name of the Hudson Bay Fur Company.

The Wood vs. Peffer case, while it involved a somewhat different situation, involved the use by

the defendant of the plaintiff's name, contending that it was making a sale of merchandise of the deceased Wood, who had carried on a business in Sacramento for the sale of refrigerators and that kind of merchandise. Subsequently the defendant in Stockton advised over the radio that he was selling out the merchandise that had previously been handled by the decedent in Sacramento, and one of the arguments against an injunction was that these places were some fifty miles apart, and there was no competition in the sale at retail at those two remote places of business, but the court held otherwise. It said that in these days of easy transportation, which was before the war, shoppers do go to various places to secure the best bargains, especially in fields where sales are widely advertised, and the principle was recognized that they did not have to be in the same area.

It seems to me that the evidence in this case shows that plaintiff was doing business with San Jose residents [18] as well as Palo Alto and other surrounding areas; that it has therefore established a good will in that community, and that the use by the defendant of the name by which the plaintiff is generally, certainly in a majority of cases, known by its customers in that area, is of necessity bound as a necessary result to injure the reputation and good will and infringe on the rights of the plaintiff, because some of these people will, as they have, come to the conclusion that the plaintiff has opened a store in San Jose and will patronize the defendant to the injury of the plaintiff. and they will come

to the conclusion that the plaintiff has departed from some of its regular practices of business and will therefore lose the patronage of the customer. Whether the injury can be measured, or not, is not the test; as your Honor well knows, if there is a probability of injury the good will and reputation of the plaintiff should be protected, and it would be protected without any damage or injury to the defendant. We think the evidence in this case proves it, and the plaintiff should therefore have relief. As to the nature of the relief, that is a matter that we have also covered in a memorandum which the court has.

So far as the particular findings are concerned which the court has signed, we believe that our objections which are covered at length in the memorandum filed in support of [19] this motion show the features of the findings which are either in our view inaccurate or inadequate. For instance, on the question of the policy of expansion of the plaintiff's business, we believe that the finding as proposed by the plaintiff is completely within the record and more complete and reflects better the fact than does the finding that the court has signed, and we believe in addition that the court's finding does create confusion, because it does not appear that the opening date of 1930 is the time that the plaintiff commenced business but the time when it commenced business in California, which is a true finding. There is no basis for limiting the history of the plaintiff's business in California when we know that it started some years before that. The

California business is merely one evidence of the expansion policy practice of the plaintiff, so that we think that the finding, to be completely accurate, should reflect that as set forth in our memorandum, rather than as set forth in the finding signed.

There are other phases of the findings, such as in connection with the taking of a lease in San Jose, which on the basis of the finding as agreed would clearly indicate that plaintiff took a lease and then in effect it had abandoned it, whereas the facts are to the contrary, and as the facts are in the proposed findings we have made.

There are a number of other matters which I won't take up the time of the court explain now, because they are in the [20] memorandum, but the findings of the court completely ignore the fact that the defendant, himself, has never done business as Lerner's before, had never been in the retail business, had never done any business in San Jose, so that it would not be as though he was giving up something that he had established before. I believe that the findings should be amended in accordance with our memorandum, and I think then there will be a more accurate finding, more corresponding to the facts. We think as a matter of law that the plaintiff is entitled to relief; whether or not the relief should be all that the plaintiff asked for or as much lesser relief as the court feels would protect the plaintiff, and for that reason we believe that the findings should be amended, and likewise amended in accordance with the motion for a new trial.

The Court: I will tell you, as far as any relief that the plaintiff would have been entitled to, even if the court had decided in favor of the plaintiff, it seemed to me that the proposed changes that the defendant offered to make were adequate, and the parties should not proceed along those lines, and therefore the issue presented to the court remained as to whether or not there was liability. I felt that there was no substance to the claim that the plaintiff had a good will that amounted to a property right in San Jose, and further it seemed to me that the evidence did not sustain the contention of the plaintiff that the defendant was engaged in the [21] activities complained of by the use of the name, and even assuming that there was a property right, that it was not violated in any way. However, I will look at your memorandum, and if you feel that there is nothing further, aside from what you have said, I will mark the matter submitted. If I feel that there should be some change in the decision and I feel that it is necessary to hear further from counsel for defendant, I will let you know, but at the moment I do not see any point in hearing any argument.

Mr. Robinson: I just want to call your Honor's attention to one line of testimony by Mr. McGee, that indicates the manner in which the firm obtained business. On page 76, when he was questioned by me on cross-examination he stated:

"Q. I understood you to say this morning that you choose locations near department stores because the department stores advertise in newspa-

pers and brought trade in and that trade, therefore, is attracted and becomes your potential customers?

A. They come downtown or come from San Jose to San Francisco as a result of department store advertising, and when they get to San Francisco they see the Lerner shops and come in to buy.

Q. You, yourself, don't advertise in newspapers? A. We do not."

Pursuant to that testimony and other similar testimony [22] by Mr. McGee the findings, as I originally presented them, did not have the word "substantially" in there, but "exclusively." It originally read, "The customers of said 'Lerner Shops' consist almost exclusively of persons who comprise the pedestrian traffic passing the respective stores, consisting in each instance, principally of persons from within the city and immediate environs where a 'Lerner Shop' is situated, but including some persons from other areas throughout the United States and other places."

Your Honor inserted the word "substantially" in place of "almost exclusively," but the main point is this, the people who come from San Jose or wherever they come from, come to San Francisco, according to Mr. McGee's testimony, drop into the Lerner Shop the same as they do from India, or other parts of the world. They are not attracted by advertising and are not attracted by mail or newspaper advertising. It is simply, as your Honor has pointed out, the simple application of appropriation law to the particular facts here.

There has been no particular appropriation of the San Jose area.

The Court: Are you going to argue this matter? If you do maybe I will find from your discussion that you are wrong.

Mr. Goldberg: I think that the court, in considering the record as read by counsel should also have in mind that [23] you cannot pick that out and prove your case because it also appears from the record that Lerner's in San Francisco and their other stores in San Francisco which have regular customers, people who come from San Jose as well as other places. It may well be that people will come into Lerner's Stores because they are attracted by an ad of the Emporium and then see the Lerner window and go in, but that doesn't mean they only went into Lerner's Store because they were attracted by advertising.

Your Honor stated you will examine the memorandum that was filed in connection with the motion. The authorities on which we rely are in the memorandum which was filed with your Honor some time ago in connection with the pre-trial conference.

The Court: I will mark the matter submitted.

In the Southern Division of the United States District Court for the Northern District of California

CLERK'S CERTIFICATE TO REPORTER'S
TRANSCRIPTS

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the following Reporter's Transcripts were filed in the above-entitled case, and are herewith forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, to be considered by it as part of the Record on Appeal herein, to-wit:

Reporter's Transcript for Monday, December 24, 1945.

Reporter's Transcript for Monday, January 21, 1946. Said Reporter's Transcripts are to be returned to the Clerk of this Court at the termination of the appeal herein.

Witness my hand and seal of the District Court of the United States for the Northern District of California, this 17th day of June, 1946.

[Seal]

C. W. CALBREATH,

Clerk.

By M. E. VAN BUREN,

Deputy Clerk.

[Endorsed]: Filed June 17, 1946.

[Endorsed]: No. 11347. United States Circuit Court of Appeals for the Ninth Circuit. Lerner Stores Corporation, a corporation, Appellant, vs. Wilfred A. Lerner, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 7, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11347

LERNER STORES CORPORATION, a corporation,
tion,

Appellant,

vs.

WILFRED A. LERNER,

Respondent.

Statement of Points on Which Appellant Intends
to Rely on Appeal and Designation of Parts
of Record Necessary for Consideration thereof.

To the United States Circuit Court of Appeals for
the Ninth Circuit and to the Clerk of Said
Court:

Now Comes the appellant in the above-entitled

and numbered case, and, pursuant to subdivision 6 of Rule 19 of the Rules of Practice of the above-entitled Court, files with the Clerk of said Court a statement of the points upon which appellant intends to rely on the appeal, and designates the parts of the record which appellant thinks necessary for the consideration thereof.

STATEMENT OF POINTS TO BE RELIED UPON

1. The question involved upon this appeal is the right of the plaintiff, a long-established retail firm whose business is known and referred to as Lerner's, to enjoin and recover damages from defendant, whose name is Wilfred A. Lerner, and who opened a new business in the same line and in the sale retail-trade area as plaintiff, and designated his newly-opened business as "Lerner's."

2. The evidence at the trial was uncontradicted: That the plaintiff has been in business for many years, with stores in numerous locations throughout the United States, including San Francisco and Oakland, California; that at the time that defendant opened his business, the plaintiff's stores had come to be known to and designated by the purchasing public as Lerner's, and were addressed and dealt with by the public under that name; that the plaintiff was the first-comer in the field of the sale at retail of women's and children's wearing apparel under the name of Lerner's, and the first to be designated by the public as Lerner's, and plaintiff earned the right to the exclusive use of

that particular designation in that field; that the defendant opened a new business in the city of San Jose and designated it as Lerner's, and engaged in a course of conduct which was calculated to make the public believe that defendant's business was that of the plaintiff; that San Jose is in the same retail-trade area as the cities of San Francisco and Oakland, where plaintiff has had stores for a number of years; that although the defendant's name is Wilfred A. Lerner and although he had never previously been engaged in the retail business, he nevertheless persisted in setting up a new business under the name of Lerner's; that customers of plaintiff have been misled into believing that defendant's business was that of the plaintiff and was operated by plaintiff.

3. Appellant will show that:

(a) Under the evidence the Court erred in refusing to grant the injunction requested by the plaintiff;

(b) The Court erred in refusing to grant to said plaintiff damages from defendant;

(c) The Court erred in refusing to grant any relief to plaintiff in connection with the use of the name "Lerner" by defendant in the same line of business as that in which plaintiff had long been engaged;

(d) The Court erred in refusing to make any findings on material points as to which the evidence was uncontradicted;

(e) The Court erred in making findings which are not supported by the evidence and which are in conflict with the evidence.

PARTS OF RECORD DEEMED NECESSARY

6. Appellant thinks that it is necessary for the consideration of this appeal that the record, as certified to the above-entitled Court be printed in its entirety, and, therefore, in accordance with the rule in such cases provided, designates for printing said entire record.

Appellant further deems it necessary for the consideration of this appeal, that the Court consider the reporter's transcript of the evidence at the trial, all exhibits received in evidence, a transcript of the proceedings on the hearing of plaintiff's objections and proposed amendments and additions to findings of fact and conclusions of law proposed by defendant, and a transcript of the proceedings on the hearing of plaintiff's motion for a new trial.

Dated: June, 1946.

Respectfully submitted,

JESSE H. STEINHART.

By S. A. LADAR,

Attorneys for Appellant.

[Endorsed]: Filed June 17, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto that none of the exhibits admitted in evidence at the trial of said action need be reproduced, other than plaintiff's exhibits 11, 12, 13 and 18; and

It Is Further Stipulated that all other exhibits admitted in evidence in said action may be considered by the above-entitled court in their original form.

Dated: June 15, 1946.

JESSE H. STEINHART.

By /s/ S. A. LADAR,

Attorneys for Appellant.

MARCEL E. CERF,

ROBINSON & LELAND.

By /s/ HENRY ROBINSON,

Attorneys for Respondent.

It Is So Ordered.

/s/ FRANCIS A. GARRECHT,

Judge of the Above-Entitled
Court.

[Endorsed]: Filed June 18, 1946. Paul P.
O'Brien, Clerk.

No. 11,347

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

LERNER STORES CORPORATION (a corporation),

Appellant,

VS.

WILFRED A. LERNER,

Appellee.

BRIEF FOR APPELLANT.

JESSE H. STEINHART,

111 Sutter Street, San Francisco 4, California,

Attorney for Appellant.

FILED

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PAUL P. O'BRIEN,
CLERK

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No. 11,347

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LERNER STORES CORPORATION (a corporation),

Appellant,

vs.

WILFRED A. LERNER,

Appellee.

BRIEF FOR APPELLANT.

ABSTRACT OF THE CASE.

May it Please the Court:

Appellant Lerner Stores Corporation brought this action to enjoin appellee Wilfred A. Lerner from designating as "Lerner's" a newly-opened retail store in San Jose, California. Both parties are engaged in the retail sale of feminine wearing apparel. The District Court denied the injunction on the ground, in effect, that although appellant operated a national chain of 181 stores in 41 states and the District of Columbia, including 13 stores in California of which 2 are in San Francisco and 1 in Oakland, nevertheless, under such facts there could be no unfair competition between the parties because appellant did not

have one of its stores in San Jose; this in spite of the undisputed fact that appellant had a regular patronage from San Jose and communities adjoining it. This is an appeal by plaintiff from the judgment in favor of the defendant.

JURISDICTIONAL STATEMENT.

The statutory provision that sustains the jurisdiction of the District Court is Judicial Code, Section 24 first, 28 U.S.C.A. 41(1), granting original jurisdiction to the District Courts of all suits of a civil nature between citizens of different states where the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.00. The complaint (Tr. 2) and the findings (Tr. 30) disclose the requisite jurisdictional facts.

The statutory provision that sustains the appellate jurisdiction of this Circuit Court of Appeals is Judicial Code, Section 128, 28 U.S.C.A. 225, granting jurisdiction to review "final decisions in the district courts".

SPECIFICATION OF ERRORS.

Appellant's position is that:

(1) The trial Court erred in refusing to make any finding on certain material points as to which the evidence was uncontradicted;

(2) Many of the findings made by the trial Court are not supported by the evidence;

(3) Under the uncontradicted evidence the Court erred in refusing to grant any relief to appellant in connection with the use by appellee of the name "Lerner".

In presenting this appeal appellant has in mind the governing rule that the trial Court's appraisal of the evidence will not be set aside unless it is clearly erroneous. This appeal is predicated upon the proposition that a review of the evidence in detail and consideration of the record as an entirety leads to the conclusion that material portions of the findings of the trial Court are not supported by evidence, that the lower Court failed to give proper legal effect to the facts set forth in the record, and that the judgment should be reversed upon the basis of the well settled rule that:

"The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court."

Aetna Life Ins. Co. v. Kipler, 8 Cir., 116 F.

(2d) 1, 5.

STATEMENT OF THE EVIDENCE.

The record shows the following uncontradicted facts (References are to the printed Transcript of Record):

Appellant is a corporation organized under the laws of the State of Maryland. Both directly and through the medium of wholly-owned subsidiary corporations, appellant is engaged in the operation of a large chain

of retail stores which sell feminine wearing apparel, styled and sized primarily for juniors and misses. (Tr. 217-218.) The items sold are skirts, suits, dresses, fur-trimmed and untrimmed coats, fur coats, sweaters, slacks, slack suits, blouses, lingerie, hosiery, millinery and handbags. (Tr. 184-185.)

At the time this action was commenced the stores operated by appellant numbered 181, and were located in 41 states and the District of Columbia. Appellant does not advertise its stores in newspapers or magazines or over the radio, but the stores are patronized by literally millions of customers each year. (Tr. 104-105.) Appellant's stores constitute a profitable business to which is attached a valuable good will. (Tr. 93, 161-162.)

Each of the stores is formally designated as "Lerner Shops" by a billboard type of sign located above and extending across the front of the store, and by appellant's price tags, boxes and bags and sales slips. But the evidence proved beyond the possibility of argument that both in speaking and writing, appellant's patrons designate the stores as "Lerner's". The bulk of the checks received from customers are made out to "Lerner's". (Tr. 192.) Original checks not deposited and photostats of checks which had been deposited were presented in Court. (Tr. 191.) The customers speak of the stores as "Lerner's". (Tr. 190, 194, 213, 228.) A survey made among the people on the street showed that more than 95% of persons contacted know and designate the stores as "Lerner's". (Tr. 225-227.)

The operating policies of appellant, practiced on a national scale, are calculated to build up a nationwide reputation and good will. All of appellant's stores carry the same quality and styles of merchandise and sell for uniform prices throughout the country. (Tr. 64.) A garment is sold for the same price in San Francisco as in New York without regard to transportation or other expense differentials. (Tr. 65.) Such uniform pricing differs from the general practice of competitors. (Tr. 65.) Appellant's patrons have the privilege of obtaining exchanges, adjustments or refunds in any of its stores, no matter where the original purchase was made. Many patrons make use of this privilege. (Tr. 101-102.) Appellant's stores in the various cities, such as San Francisco, are patronized every day by many persons who have traded in its stores in other cities. (Tr. 212, 215, 223.) Such patronage constitutes a substantial amount of business. (Tr. 93-94.)

Appellant sells on a mark-up of approximately $33\frac{1}{3}$ per cent (Tr. 162), which is a lower mark-up than is used by most of its competitors. (Tr. 200-201.) Articles such as coats or dresses may be purchased in appellant's stores for one or two dollars less than the same or comparable articles are sold in nearby large department stores. (Tr. 65-66.) For example, the same dresses which are sold by appellant for \$7.95 are sold in The Emporium in San Francisco for \$8.98 and \$9.98, and appellant's coats sold at \$18.95 sell from \$19.00 to \$22.95 in The Emporium. (Tr. 194-195.) Similarly, the prices in appellant's stores are

usually lower than those of competing chains of stores such as Zukors and others. Dresses sold by appellant for \$7.95 cost \$8.95 at Zukors. (Tr. 200-201.) There are some chain stores which sell for about the same prices as appellant, but very few stores of any type which undersell appellant. Appellant sells the same merchandise sold by others, but at cheaper prices. (Tr. 117.)

Appellant has established a reputation for selling garments of the latest styles at popular prices. (Tr. 216-217.)

The origin of appellant's business dates back to 1919. Its entire history has been one of expansion of its retail stores. Three brothers, Samuel Lerner, Joseph Lerner and Michael Lerner, opened the first stores, six in number, in New York and New Jersey in 1919. They were designated "Lerner Blouse Corporation". Subsequently, additional stores were opened and additional corporations formed, the capital stock in each instance being owned directly or through a parent-subsidary arrangement by the three Lerner brothers. The names of the corporations were changed in 1925 to "Lerner Stores Corporation". Appellant was incorporated in 1929 and acquired from the three Lerner brothers the stock of the companies which had been previously organized. (Tr. 72-74, 111-113.) Appellant has outstanding capital stock consisting of 1,200,000 shares of Common Stock and approximately 32,000 shares of Preferred Stock. The Common Stock is listed on the New York Stock Exchange and is held by between 1200 and 1500 persons. The Preferred

Stock is not listed but is traded in over-the-counter. (Tr. 92-93.) The three founders of the business are still active: Samuel Lerner is Chairman of the Board of Directors, Joseph Lerner is President of the Company, and Michael Lerner is Treasurer and a Vice-President. (Tr. 71.) In addition, Joseph Lerner has two sons and Samuel Lerner has one son who are connected with the business but at the date of trial were absent therefrom while serving in the United States Army. (Tr. 72.)

It has been the policy and practice of appellant to continually expand its organization and open new stores. (Tr. 75.) Starting with six stores in 1919, new stores were added: 8 stores in 1921, 1 store in 1922, 4 stores in 1923, 12 stores in 1924, 9 stores in 1925, 14 stores in 1926, 20 stores in 1927, 27 stores in 1928 and 35 stores in 1929.

The remaining 45 stores making up the total of 181 stores were opened during the years 1930-1944, including appellant's 13 stores in California.

The practice is for new stores to be opened first in populous cities, followed by stores in surrounding communities (Tr. 76, 137) after a nucleus of business from the surrounding communities has been built up. (Tr. 79-80.) That is the practice of other chain store organizations as well as appellant. (Tr. 80.) Leases or purchases of property are made in advance in accordance with the plan of expansion (Tr. 69, 63-64) and the property is improved and occupied by one of appellant's stores as soon as possession can be obtained. (Tr. 86.) Appellant gave up a few leases during the

early years of the depression which started in 1929, but no location has been abandoned since 1932. (Tr. 145.)

Appellant first began business in the State of California in 1930. It established its stores in California at the times and places shown by the following list, and except as noted, has continued to operate such stores (Tr. 67-69):

Pasadena	1930
Santa Barbara	1930
San Diego	1930
San Bernardino	1930
Los Angeles	1930
(Closed in 1942 because of inability to renew expired lease)	
Long Beach	1931
San Francisco (Grant Avenue store) . . .	1934
Oakland	1934
San Francisco (Market Street store) . . .	1935
Stockton	1940
Huntington Park	1942
Inglewood	1942
Bakersfield	1943
Fresno	1944

As a part of its program of expansion appellant had also planned the opening of additional stores in California. At about the same date that appellee opened his store (Tr. 85-86) appellant had leased larger quarters for its Market Street store in San Francisco (Tr. 63-64) and had leased or purchased for the establishment of stores 14 additional locations in California in the following cites (Tr. 69):

Beverly Hills
Glendale
Hollywood
Los Angeles
Riverside
Santa Monica
Ventura
Modesto
San Jose
Burlingame
Palo Alto
San Mateo
Vallejo
Sacramento

The location which appellant had leased in San Jose consists of a piece of property at 152 South First Street. It is on the same side of the street in the block immediately south of the store subsequently opened by appellee at 70 South First Street. Appellant concluded the lease of said San Jose property in 1941, for a term of 21 years, commencing July 21, 1942. Under the terms of the lease appellant was obligated to build a new building on the leased premises and to conduct one of its regular stores therein. However, subsequent to the execution of the lease, but prior to the commencement of the term thereof, the war broke out and the necessary construction work upon said premises was prohibited by the regulations of the War Production Board. The lease has continued in full force and effect, and appellant plans to construct the new building and open its store in San Jose as soon as the war restrictions will permit. (Tr. 83-85.)

Appellant's two stores in San Francisco were opened in 1934 and 1935 respectively and its Oakland store was opened in 1934. Photographs of these stores constitute Plaintiff's Exhibits 1 and 2 in evidence. (Tr. 89-90.) One of the San Francisco stores is at 871 Market Street, adjoining The Emporium. It has a frontage of 80 feet on Market Street, is 258 feet deep, and uses the first and second floors and the basement of the building. (Tr. 63.) The other San Francisco store is on Grant Avenue, adjoining The White House (Tr. 67), and has a frontage of 20 feet on Grant Avenue. (Tr. 92.) The Oakland store is located at the corner of 12th and Washington Streets and has a frontage of 18 feet. (Tr. 67, 92.)

In locating its stores in San Francisco, appellant took into consideration the trading area of San Francisco. (Tr. 77.) Mr. Magee, a vice-president of appellant, and the man who made appellant's original leases in San Francisco, testified that he took into consideration the fact that there are easy transportation facilities for shoppers between San Francisco and certain surrounding communities, that the people of such communities read the morning and evening San Francisco newspapers carrying extensive advertising of San Francisco retail stores, and that such papers are sold on the streets in such communities. (Tr. 77-78.) He determined that communities located as is San Jose are within the trading area of San Francisco. (Tr. 77-78.)

Mr. Magee further testified that at the time that he started to negotiate for a lease in San Jose it had

been determined by appellant that the company had built up a nucleus of business in San Jose and surrounding communities for the opening of a new store in that city. (Tr. 79.) Appellant's stores sell only for cash, and no record is kept of the names or addresses of patrons. However, customers who desire to make exchanges or procure refunds are required to sign slips and give their names and residences. In addition, some patrons pay by checks drawn on banks located in the cities or towns where they reside. Mr. Magee pointed out (Tr. 79): "Yes, we had been in business on Market Street in our large store since 1935 and we had built up a very substantial volume. The records that we would have there in the form of credit slips would indicate we had a great many customers in San Jose, and also other surrounding communities of San Francisco."

Supplementing the foregoing testimony, appellant produced in Court its original business records of exchanges, refunds and adjustments as well as checks and photostatic copies of checks received from customers and drawn on banks located where such customers reside. (Tr. 211.) The refund and exchange slips showed that in a period of eight months ending March, 1945, appellant's Market Street store had 263 exchange and refund transactions with persons residing on the San Francisco Bay peninsula from San Mateo to and including San Jose. (Tr. 189.) Refund and exchange transactions occur in from six to seven per cent of the total sales made by a store of appellant. (Tr. 187.)

Therefore, it may be deduced that the total number of transactions of such store from those communities on the peninsula during the eight months' period was 4,400 transactions or an average of 550 transactions per month. (Tr. 189.) The exchange and refund slips produced in Court showed that 30 of the patrons who made exchanges were from Palo Alto, 31 from Redwood City, and 13 from San Jose. (Tr. 211.) It may be further deduced, therefore, that appellant's Market Street store alone has approximately 324 transactions per year with residents of San Jose and a larger number of transactions with residents of Palo Alto and Redwood City, and the record shows that appellant's Grant Avenue store and its Oakland store had additional transactions with residents of each of those communities. (Tr. 228.) Appellant's employees in its San Francisco and Oakland stores testified that they have many customers from Redwood City, Palo Alto, San Jose, Santa Clara, Los Altos, Los Gatos and other peninsula communities, and that such customers patronize appellant's stores regularly and continually and not merely on isolated occasions. (Tr. 186, 214, 223-224.) The checks received from customers drawn on banks in the peninsula communities and produced in Court substantiated the foregoing testimony of appellant's employees. No attempt was made to contradict the foregoing testimony.

Moreover, it was not disputed that about 25 per cent of the retail business done in San Francisco comes from communities outside of San Francisco and that

about 9 per cent of all of the business done in San Francisco comes from the peninsula area, south from San Francisco to San Jose. (Tr. 206-208.)

The conduct of appellee Wilfred A. Lerner of which appellant complains began in May, 1944, shortly prior to the date that appellee opened his store in San Jose and designated it as "Lerner's". At that time appellee ran a series of advertisements in the morning and evening newspapers published in San Jose and sold and circulated in that city and in the surrounding communities such as Palo Alto, Redwood City, and others. (Tr. 234.) Those advertisements are set forth at pages 12-15 inclusive of the transcript. In those advertisements appellee advertised neither prices nor quality of merchandise, and stressed the opening in San Jose of "Lerner's". The first advertisement which appellee published in the San Jose newspapers stated (Tr. 12):

"Ladies
For You Soon
Lerner's
70 South First Street
Watch
Wait."

This was followed by an advertisement which set forth that (Tr. 14):

"LERNER'S
70 S. First St., San Jose
Makes a 'Spectacular Entrance!'"

After his store had been opened approximately one week, appellee's newspaper advertisement (Tr. 15)

expressed appreciation for acceptance of the new store and closed with the words:

“As always—Lerner’s.”

Appellee had never engaged in business in the sale of feminine wearing apparel at retail prior to May, 1944. He had never before engaged in any retail business and had never before had a place of business of any kind in San Jose. He had been associated for many years with his father in San Francisco, in the manufacture and in the sale at wholesale to dealers and stores of woman’s coats and suits. That business was conducted exclusively under the name “L. G. Lerner”. Appellee knew of appellant’s stores in San Francisco, Oakland, and elsewhere prior to opening his retail store in San Jose and had been in one or more of such stores. (Tr. 230.)

Appellee’s store in San Jose is located on the main shopping street in the central business district, and employs six persons in addition to appellee and his wife. (Tr. 258.) It is approximately 20 feet wide by 110 feet deep. (Tr. 258.) Plaintiff’s Exhibit No. 9 (Tr. 231) in evidence shows its appearance at the time that it was opened. It was designated as “Lerner’s”:

(a) By means of a billboard type of sign 18 feet wide placed above the front of the store and extending the entire width thereof, upon which the name “Lerner’s” was placed in large letters across the entire width of the sign;

(b) By the inscription of the name “Lerner’s” on each of the show windows of the store (Plaintiff’s Exhibit No. 10, Tr. 231);

(c) By the inscription of the name "Lerner's" on the marble or tile entrance-way to the store. (Plaintiff's Exhibit No. 17, Tr. 245.)

Appellee used paper bags, boxes, envelopes, stationery and sales tags upon each of which his store was advertised prominently as "Lerner's". Photostatic copies of certain of these appear in the transcript. (Tr. 235, 238, 242.)

The persons who patronize appellee's store include people from Palo Alto, Redwood City, Los Gatos, Los Altos, Santa Clara and other peninsula communities, as well as San Jose. (Tr. 260.) The merchandise sold is misses' and juniors' coats, suits, dresses, sweaters, blouses, slacks, slack suits, jackets and skirts. (Tr. 249.) And it was stipulated that the prices at which such garments are sold by appellant and appellee,— "overlap unquestionably but (appellee's) top lines are higher than (appellant's) top lines, and (appellant's) bottom lines are down lower than (appellee's) bottom lines; we overlap in the middle." (Tr. 254.) For example, appellant sold suits priced from \$6.95 to \$39.95 (Tr. 185), while appellee's price range for suits was from \$19.95 to \$45.00 (Tr. 251); appellant's range for fur-trimmed coats was from \$24.95 to \$79.00 (Tr. 185), while appellee's range for such coats was from \$49.95 to \$110.00 (Tr. 256-257); appellant's price range for dresses was from \$4.95 to \$29.95 (Tr. 185), while appellee's range for such dresses was from \$7.95 to \$20.95. (Tr. 249.)

Appellee sells on a mark-up of 42 per cent, as compared with appellant's mark-up of $33\frac{1}{3}$ per cent. (Tr. 276.)

Appellee testified that following the opening of his store persons have come in once or twice a month and have inquired whether he was related to the people who had the store in San Francisco. (Tr. 263.)

Appellant presented evidence to which the trial Court stated it could not attach any weight (Tr. 294), that some of the patrons of appellant's stores in San Francisco and Oakland had been confused and had believed that appellant had opened one of its stores in San Jose, and that some of such persons had made purchases in appellee's store under the mistaken belief that they were dealing with appellant. This evidence was as follows:

Mr. Magee testified that while he was engaged in one of his frequent visits to appellant's San Francisco stores (Tr. 96) he learned of appellee's store in San Jose through a sales girl calling attention to a customer who claimed to have bought merchandise in a San Jose store which the customer thought was one of appellant's stores. (Tr. 95.) The customer thought that the merchandise purchased in San Jose "wasn't up to the quality of merchandise sold in appellant's store in San Francisco" (Tr. 95);

Mr. Silverman, who is in charge of appellant's stores in San Francisco, testified that on a number of occasions, estimated at more than twice per week following the opening of "Lerner's" in San Jose (Tr. 196-197), he was called upon by sales persons or as-

sistant managers (Tr. 195) to speak with patrons who stated that they had been in appellant's store in San Jose. Even after Mr. Silverman told such persons that appellant had no store in San Jose, some of them would insist: "But I was in your store in San Jose" (Tr. 195-196);

Jessie Shelton, Coat and Suit Department Manager in appellant's Market Street store, testified that one of the sales girls asked her to talk to a customer who was making an inquiry concerning appellant's San Jose store. (Tr. 214.) Mrs. Shelton told the customer that appellant had no store in San Jose, but the customer was not convinced (Tr. 214);

Ann Davis, Dress Department Manager of appellant's Market Street store, testified that on a couple of occasions (Tr. 222) customers for whom she "OK'd" checks said, for example, that they were from down around San Jose and frequently shopped in appellant's store in San Jose;

It was stipulated that Mrs. Elert, Manager of appellant's Grant Avenue store, and Miss Kane, Manager of its Oakland store, would testify, among other matters, that patrons have referred to appellant's new store in San Jose, and have insisted that they had seen the store even though appellant's employees told them that appellant had no store in San Jose. (Tr. 228.)

On July 12, 1944, shortly after appellee opened as "Lerner's", appellant wrote to him and demanded that he desist from the use of that name. Appellee refused. He continued the use of the original sign over his store until after the commencement of this

action and until January 1, 1945. (Tr. 244.)At that time the word "Wilfred" was added in very much smaller letters, in the upper left hand corner of the sign (Tr. 244) in the manner shown by Plaintiff's Exhibit No. 14. The designation of the store as "Lerner's" on each of the show windows was continued until subsequent to the commencement of this action and late in 1944. (Tr. 244.) The use of the name "Lerner's" on the floor of the entrance-way has been continuously maintained by appellee without change. (Tr. 245.)

Appellee continued to advertise his store in the San Jose newspapers as "Lerner's" until after suit was commenced and until November 26, 1944. (Tr. 246-247.) On November 26, 1944, he began the use in his newspaper advertising of his given name, "Wilfred", in conjunction with the designation of "Lerner's". (Tr. 246.) Appellee continued the use of the designation "Wilfred Lerner's" in his advertisements until December, 1944, on which date he ceased the use of the apostrophe and the "s". (Tr. 246.) Appellee continued to use sales tags designating his business as "Lerner's" until April, 1945. (Tr. 240.) Boxes, bags and stickers designating said business as "Lerner's" were used until subsequent to the commencement of this action. (Tr. 238-239.) The advertisements put out by appellee and the pictures of his place of business show that in the use of the name "Wilfred Lerner" (in those instances where appellee began to use that designation) he has subordinated the name "Wilfred" both in size and position to his surname and has emphasized the name "Lerner".

At the conclusion of appellant's presentation of the foregoing evidence the trial court advised appellee that the Court did not believe that it was necessary for appellee to offer any evidence (Tr. 265) and that the Court was unable to see any equity in appellant's case. (Tr. 282.) Evidently it was the view of the trial Court, as evidenced by statements from the bench (Tr. 294-297), that while appellant had built up a valuable and expanding business and a substantial good will, it had no store actually located in San Jose, and there was no likelihood of confusion or unfair competition as between appellee's store in San Jose and appellant's stores in San Francisco and Oakland. The Court directed that findings and judgment should be prepared denying appellant any relief.

ARGUMENT.

Appellant's position is that:

(1) The trial Court erred in its analysis of the legal effect of the evidence and that such erroneous analysis resulted in findings which are wholly inadequate and misleading;

(2) On the basis of the evidence and the applicable authorities it was the duty of the trial Court to make findings based on the undisputed evidence, that appellant's business is well known and usually referred to as "Lerner's", that such business included a regular and substantial patronage from San Jose (where appellee's store is located) and from nearby communities, that appellant's business has been from its

inception an expanding one and that San Jose was within the normal area of expansion thereof when appellee opened his store and designated it as "Lerner's", and that confusion and unfair competition have resulted from appellee's designation and advertisement of his store as "Lerner's";

(3) It is uniformly held by the many authorities which have considered the matter, that a concern such as appellant which has first established a reputation for a particular name in a business is entitled to protection of that name against a later comer even though not in the same city, if the parties are in actual competition or the business of the later comer is located within the normal area of expansion of the first comer;

(4) The fair inference from the evidence is that appellee deliberately adopted the designation "Lerner's" for the purpose of obtaining the benefit of appellant's good will, in which event he should be restrained from using the name "Lerner" as his trade name. The least relief to which appellant is entitled, under the authorities, and under the most favorable view of the evidence from appellee's standpoint, is an injunction against any use of the name "Lerner" by appellee which is not accompanied by other distinguishing features such as his given name displayed with equal prominence.

I. THE FINDINGS FAIL TO REFLECT THE EVIDENCE ON MATERIAL POINTS AND ARE CLEARLY ERRONEOUS UPON OTHER MATTERS.

The findings of fact do not fairly reflect the condition of the record in that they make no reference whatsoever to a number of material matters which were the subject of uncontradicted evidence, and in other instances they find as a fact matters which are in direct conflict with all of the evidence directed thereto. Both by objection to the findings and upon motion for a new trial, appellant requested more complete and accurate findings. However, the Court refused to make findings even upon undisputed facts unless they would tend to uphold the decision which the Court desired to render, stating its view as follows (Tr. 288):

“* * * I feel that the judge, having decided the case on the facts in favor of one side, is not required to find facts that are favorable to the other side of the case, because all of those matters are in the record and may be raised on appeal, or a motion for a new trial. I know that the attorneys sometime ago in a case felt aggrieved because I would not make findings in the case as to the facts that were favorable to his side, and would only make findings of fact that were favorable to the other side, and I said that I felt I found from the facts that sustained the judgment that I wanted to give in the matter, and that I either did not believe or did not accept or did not give weight to the other facts, and I saw no reason for making a finding in the record, that the facts were in the record, and if the judgment was not sustained by the facts which the court found then, of

course, they could be set out on rehearing or motion for a new trial, or on appeal. So I say that if I rule against you, because you want me to find some facts in the case that you think would help to sustain a finding the other way, I will rule against that, because I do not think that matter is before me. I think that the court can find the facts that it believes in its judgment and in its conscience are the facts, that it wants to find that sustains the judgment. I just want to make that clear. You can raise any point on a motion for a new trial that you can raise, but I do not think that any court should stultify itself by making some finding of fact in favor of the side that has not been successful. It does not make sense to me. However, you present the matter any way you wish, but I just want to point out to you I am only going to make findings necessary to sustain a judgment in this case."

Appellant's stores are known and referred to as "Lerner's".

As a consequence of the trial Court's quoted view of what the findings should contain, there is no reference whatsoever in the findings with respect, for example, to the very material issue and undisputed proof that the majority of appellant's patrons and prospective customers identify and designate appellant's stores as "Lerner's".

Appellant had established a valuable reputation.

Likewise, the findings, while advertng to the fact that appellant sells low or popular priced apparel, fail to reflect the evidence which established without dispute appellant's allegations that appellant has estab-

lished a reputation for selling up-to-date, well-styled apparel at prices below those of its competitors.

Appellant's stores had an established trade with persons from San Jose and adjacent cities, and many regular customers.

Again, no finding was made with respect to appellant's claim and proof that prior to the time that appellee opened his store in San Jose and designated it as "Lerner's", appellant's stores in San Francisco and Oakland had established a substantial nucleus of business with residents of San Jose and communities nearby and, on the basis of such business and as a part of appellant's plan, policy and practice of expanding from the populous cities in which it had first established its stores into the smaller communities nearby, appellant had leased additional locations in which to open new stores in San Jose, Palo Alto and San Mateo and Burlingame.

Finding IV (Tr. 32) states that appellant's customers in San Francisco and Oakland consist in a substantial part of persons who comprise the passing pedestrian traffic, and in each instance principally of persons from within those cities, but include some persons from other areas throughout the United States. This finding is misleading and contrary to the evidence in several respects.

In the first place, it overlooks the material evidence that appellant is patronized regularly by persons who trade with its stores in the various cities of the country where such persons happen to be. And the evidence also showed that many of the customers of

appellant's stores in San Francisco and Oakland patronize such stores repeatedly.

In the second place, this finding is incomplete and misleading in its reference, in a rather off-handed manner, to the fact that appellant's patrons do include some persons from places other than the cities where appellant's stores are located. The facts affirmatively establish, without dispute, that a substantial number of customers of appellant's stores in San Francisco and Oakland are from cities all up and down the San Francisco peninsula, including San Jose.

Appellee took no precautions to distinguish his store from appellant's stores.

The findings fail to reflect in any manner the material evidence showing that appellee had never done business as "Lerner's" prior to the time that he opened his store in San Jose, that he had never engaged in the retail business anywhere, nor in any business located in San Jose. Nevertheless, the findings state, as a purported conclusion from the evidence, that appellee took reasonable precautions to prevent confusion between his business and that of appellant. (Tr. 33, Finding V.) The evidence clearly shows directly to the contrary. It is true that after appellant wrote to appellee protesting the designation of his store as "Lerner's", and after this litigation was started, appellee made certain changes in the sign on his store and in his advertising,—changes which came too late to undo the harm which he had caused, and concerning which there is no assurance that they will

be effective or permanent. Moreover, the evidence is uncontradicted that prior to the time that appellant became aware of appellee's store, appellee took no precautions and made no effort whatsoever to prevent confusion between "Lerner's" in San Jose and appellant's stores, although he admitted that he knew of appellant's stores in San Francisco, Oakland and other places and had visited several of such stores. There is no finding with respect to such material evidence bearing directly upon appellee's original intention in designating his store as "Lerner's".

The finding that appellee's newspaper advertising showed the differences between the two businesses, is squarely contrary to the evidence.

The findings stated that appellee's newspaper advertising,

"* * * was of such character and form as to clearly distinguish defendant's business from that of 'Lerner Shops' and the text and layout of such advertising was such as to inform the public that defendant dealt in merchandise of generally higher quality and price than said 'Lerner Shops' and that defendant catered to a higher class of trade than said Lerner Shops." (Tr. 34, Finding VI.)

The evidence on this subject is the advertising itself and such evidence is not open to dispute. The advertisement appearing on pages 12 to 15 of the transcript, and appellee's subsequent advertisements, show that they furnish no possible method whereby the prospective customers could ascertain the price or quality of

appellee's merchandise, let alone that such merchandise was higher in price or better in quality than that sold in appellant's stores. After this litigation began, appellee commenced to use the word "Wilfred" in his advertising, but such word was used in subordination to the word "Lerner". And even when appellee began to include in his advertisements the prices of his merchandise, such advertisements solicited the purchase of the same items of merchandise as are sold in appellant's stores, and show such items at prices which are in the same range as those of appellant.

Appellant's business, from the beginning, has been an expanding one.

The record shows that the trial Court was convinced that appellant's stores did have a good will and a proprietary right to the name "Lerner Shops". (Tr. 297.) Yet the findings are completely silent upon such points, as well as with respect to the evidence proving the material facts that appellant's good will was established by persons named "Lerner" as far back as 1919, and that under leadership of the Lerner family and pursuant to its plan and policy appellant has progressively expanded its organization and good will since that date. The Court likewise failed to make any findings upon the fact that appellant's stores are operated as divisions or departments of one organization, all known to the public under the name of "Lerner" or "Lerner's", in spite of their formal designation as "Lerner Shops".

Appellee's store is similar in appearance to appellant's stores.

The findings stated that appellee's store in San Jose,—

“* * * is of a character and appearance so distinctive and different in every material respect from that of said Lerner Shops that no person * * * exercising ordinary care would confuse it with said Lerner Shops.” (Tr. 33, Finding VI.)

Here again there is no evidence to support such a broad finding. The record presents a situation directly to the contrary. It is well known that in cases of unfair competition absolute identity is seldom if ever resorted to by the defendant. The photographs in evidence show that appellant has many stores of the same size and general appearance as appellee's store. Appellee's store is similar in size to appellant's stores on Grant Avenue in San Francisco and in Oakland and other places. Appellee's designation of his store as “Lerner's” on his billboard type of sign, and on his show-windows, boxes and bags, while not identical with the designation used by appellant in such instances, nevertheless consists almost entirely of the name “Lerner”, which word is the key word in the designation by which appellant is known to its patrons and prospective customers. The same articles of merchandise as appellee sells are sold by appellant and the price ranges of the parties overlap. Appellant submits that the broad and superlative finding made by the trial Court as quoted above would indicate that the two businesses do not even sell the same items of merchandise. The record is barren of any evi-

dence showing any material differences between the stores of the parties.

There was actual confusion between the two businesses.

The findings state that there has been no confusion between the two businesses and no damage to appellant. (Tr. 33, Finding V.) Appellee himself testified that some persons inquired of him concerning the relationship between the two businesses. In addition, the evidence showed that other persons patronized appellee's store believing that it was one of appellant's stores. It is true that as to this latter evidence the trial Court stated that it could not give any weight to what appellant's employees testified that customers told them, and the Court indicated that the customers themselves should have been produced as witnesses; this in spite of the practical difficulty since, in a cash business, the names and addresses of customers are not ordinarily obtained. (Tr. 96-97.) However, such evidence has been judicially recognized as admissible, and entitled to weight as showing the state of mind of customers. In so holding, it was stated:

“Without this type of proof it would be difficult to show confusion.” (*S. C. Johnson & Son v. Johnson*, 28 F. Supp. 744, 749, affirmed as modified, 2 Cir., 116 F. (2d) 427.

In the case at bar the evidence detailed above shows that employees working in each one of appellant's three stores in San Francisco and Oakland had separately encountered patrons who had mistaken appellee's store for one of appellant's stores. Such

evidence constituted substantial proof of the likelihood of confusion as well as of actual confusion. The conversations between employees and patrons on this matter began to occur prior to the time that appellant even knew that appellee had opened a store designated as "Lerner's" in San Jose, and appellant's chief executives neither knew of nor anticipated such occurrence. Such conversations took place between employees and patrons who are not expected to know the importance of the matter or the possibility of litigation, and the patrons probably would have taken offense if an attempt had been made to involve them in litigation. Furthermore, it appeared that some of the employees did not even know that the appellant had not opened one of its stores in San Jose. The nature of appellant's organization is such that it could not expect its employees as a practical matter to get the names and addresses of or to detain customers in order to acquaint them with the facts and solicit their aid in litigation. Therefore, both on principle and authority appellant was entitled to a finding that the evidence showed that there had been actual confusion between the two businesses and that some persons had patronized appellee believing that they were patronizing appellant.

The two businesses compete within the same trading area.

Paragraph VII of the Findings states that:

"defendant was first in the field in and about the City of San Jose in the retail ladies' ready-to-wear business under a name including the word 'Lerner's'."

This finding also includes a statement that the business of appellee is in a separate "trading area" from any of appellant's stores. Hereinabove we have set forth in detail the uncontradicted evidence on these subjects. Such evidence shows (and most residents of the San Francisco Bay Area well know) that both San Jose and the cities in the vicinity thereof such as Palo Alto, Los Altos, Los Gatos and others, are within the trading area of San Francisco, and that San Francisco retail stores in the central shopping district expect and regularly receive a portion of their business from residents of such communities. Appellee opened his store in San Jose under the name "Lerner's" after appellant had leased a location but prior to the time that appellant was able to open its planned store in San Jose. But the evidence leaves no doubt that prior to the opening of appellee's store appellant was doing business with persons residing "in and about the city of San Jose", and had taken definite steps to maintain its patronage and enlarge its activities, and as a part of its plan and practice of expanding its organization into the area near its San Francisco and Oakland stores had procured said location and said lease.

Appellant's plan to open one of its stores in San Jose was delayed by the outbreak of the war.

Paragraph IV of the findings adverts to the fact that appellant had leased premises in San Jose in 1941 and that the premises were occupied by sub-tenants at the time of trial. But again, the finding is incomplete and misleading: there is no reference to the

evidence that appellant was required to reconstruct the leased premises after July 1942, that the war and construction limitations intervened, and that appellant was therefore required to postpone reconstruction and the use of most of the premises for one of its stores, as required by its lease, until the lifting of construction regulations.

Appellant was the first to do business under the name "Lerner" with residents of San Jose.

What has been said above concerning Paragraph VII of the findings applies equally to the additional portions of said paragraph wherein it is found that appellee is not doing business in any area or market previously entered by appellant and that appellee is not in competition with appellant. There is no evidence to support such finding and there is uncontradicted evidence pointed out hereinabove which shows that appellant's stores in San Francisco and Oakland had regular and continual patronage from residents of San Jose and communities nearby and that there is a substantial amount of trade with San Francisco stores by persons who resided in such cities.

II. RECAPITULATION OF BASIC FACTS.

Appellant submits that under the authorities which have considered factual situations like the one at bar prejudicial error was committed in these omissions of the lower Court to make findings upon material matters and in the making of findings which

are clearly contrary to the evidence. The relevant authorities, to which we shall refer, uniformly hold that the evidence contained in the record at bar entitled appellant as a matter of law to an injunction against appellee, even though the nature and extent of the relief to be granted appellant may lie in the exercise of sound legal discretion.

Properly analyzed the record definitely and clearly establishes the following salient facts as to which findings should have been made in accordance with the evidence which has been detailed above:

1. Over a period of twenty-eight years beginning in 1919 appellant's business had been built up and through policy, plan and practice had been expanded into particular areas throughout the country so that at the time of trial appellant had 181 stores in 41 states and the District of Columbia;

2. The formal designation by appellant of its stores is "Lerner Shops", but the majority of its patrons and prospective customers know and refer to appellant and its stores as "Lerner's";

3. Appellant expanded into California in 1930, and prior to the time that appellee opened a store designated as "Lerner's" in San Jose appellant had had thirteen stores in this state, two of which are in San Francisco and one in Oakland;

4. In the operation of its business in California it has been the policy, plan and practice of appellant, like that of other chain store organizations, first to establish its stores in populous cities and in the best

retail business sections thereof, and after building up a patronage from the residents of the area from which such cities draw their trade, to use such patronage as a nucleus for new stores in the smaller communities suburban to such populous cities;

5. In conformity with such policy appellant first opened its stores in the Bay area in San Francisco and Oakland in 1934 and 1935 and thereafter leased or purchased additional locations for stores on the San Francisco peninsula, one of which was in San Jose. Appellant negotiated a lease of the San Jose location in 1941, the term to commence July 1, 1942 when pre-existing tenancies of the premises would expire. However, the advent of the war and governmental restrictions on reconstruction thereafter precluded appellant from carrying out the obligations of its lease to reconstruct and occupy most of the location with one of its stores, at any time prior to the date that appellee opened his store in San Jose on June 1, 1944;

6. Appellant's regular business records, consisting of exchange, refund and adjustment slips and photostats of checks received from patrons, as well as the testimony of appellant's employees, demonstrate beyond doubt that appellant's stores in San Francisco and Oakland were patronized regularly and continually by residents of San Jose, Palo Alto and Redwood City and other communities to the extent of hundreds of transactions each year. Similarly, a survey made among persons upon Market Street in San Francisco and the uncontradicted testimony of

the employees of appellant, proved beyond argument that appellant's stores in San Francisco and Oakland receive substantial patronage each day from persons who were its customers in stores in other cities at some prior time;

7. In May, 1944, and admittedly with prior knowledge of the existence of appellant and its stores throughout the country, appellee designated his newly opened store in San Jose as "Lerner's". Appellee's name is Wilfred A. Lerner. He had never been in the retail business anywhere, had never been in any business in San Jose and had never operated or been connected with a previous business designated as "Lerner's". All of the items of merchandise which appellee carried were also offered for sale in appellant's stores and the price ranges of the two businesses overlapped;

8. Appellee's store draws patrons from an area which includes Palo Alto, Redwood City, Los Altos and other cities which are also within the trading area of San Francisco and Oakland;

9. In announcing the opening of his store and after beginning business appellee ran advertisements in the San Jose newspapers offering for sale articles of merchandise which are the same as those offered in appellant's stores, and which advertised neither prices nor quality. Such advertisements featured the name "Lerner's";

10. Employees in each of appellant's stores in San Francisco and Oakland have from time to time en-

countered patrons who have patronized or visited appellee's store under the mistaken idea that it was one of appellant's stores. Moreover, appellee himself testified that persons coming into his store as often as once or twice a month asked him if he was related to the people who have the store in San Francisco.

11. Appellant's business is widely known and its good will is extremely valuable, appellant's reputation being that it sells up-to-date, well-styled items at prices which are lower than those of competitors. Appellant operates upon a margin of gross profit of approximately 33-1/3 per cent while that of appellee is approximately 42 per cent, thereby enabling appellant to sell the same or comparable merchandise for less than the prices charged by competitors, including appellee.

III. BY REASON OF THE FACTS THAT APPELLANT'S STORES ARE KNOWN AND REFERRED TO AS "LERNER'S", AND ITS STORES IN SAN FRANCISCO AND OAKLAND HAVE REGULAR CUSTOMERS IN SAN JOSE AND NEARBY PENINSULA CITIES AND ARE CONTINUALLY PATRONIZED BY RESIDENTS OF SUCH AREA, APPELLANT WAS ENTITLED TO AN INJUNCTION RESTRAINING APPELLEE FROM OPENING A COMPETING STORE IN SAN JOSE KNOWN AS "LERNER'S".

The general principle according to which the rights of the parties are governed is stated by the Supreme Court of the United States in the case of *L. E. Waterman Company v. Modern Pen Company*, 235 U. S. 88, 35 S. Ct. 91, 59 L. ed. 142, 146, as follows:

“But, whatever generality of expression there may have been in the earlier cases, it now is established that when the use of his own name upon his goods by a later competitor will and does lead the public to understand that those goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to, and, if that be material, is intended by, the later man, the law will require him to take reasonable precautions to prevent the mistake. *Herring-Hall-Marvin Safe Co. v. Hall’s Safe Co.*, 208 U. S. 554, 559, 52 L. ed. 616, 620, 28 Sup. Ct. Rep. 350. There is no distinction between corporations and natural persons in the principle, which is to prevent a fraud.”

This principle was applied by this Court in the case of *Horlick’s Malted Milk Corporation v. Horluck’s Inc.*, 9 Cir., 59 F. (2d) 13, wherein this Court held:

“Defendant seeks to justify its use of the word ‘Horluck’s’ in its name and in its advertising of malted milk upon the ground that the surname of its founders and principal stockholders is ‘Horluck’. As a general proposition, a person has a right to use his own name in connection with any business which he carries on honestly. *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972. But where a personal name has become associated in the minds of the public with certain goods or a particular business, it is the duty of a person with the same or similar name, subsequently engaging in the same or similar business or dealing in like goods, to take such affirmative steps as may be necessary

to prevent his goods or business from becoming confused with the goods or business of the established trader. *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 559, 28 S. Ct. 350, 52 L. Ed. 616; *L. E. Waterman Co. v. Modern Pen Co.*, 235 U. S. 88, 35 S. Ct. 91, 59 L. Ed. 142. * * *''

The foregoing cases were concerned with the use of a name as applied to a product but the law is well settled that there is no difference between the rule which governs those cases and that which is applicable with respect to the use of a name to designate a business. This was recently pointed out by the Supreme Court of California in the case of *Academy of Motion Picture Arts and Sciences v. Benson*, 15 Cal. (2d) 685, wherein the factual problem was not like that at bar, but the Court had occasion to define the rules by which the law of California measures the rights of the parties in this class of cases. The Court there held:

"The defendant has adopted a name which *prima facie* is broad enough in its concept to be mistaken by the ordinary unsuspecting person for the institution created by the incorporators of the plaintiff. The plaintiff has stated a cause of action which, if supported by proof, would entitle it to the relief sought, or which would require the defendant to alter her trade name by some designation calling attention to the limited scope of her school in order to prevent confusion with the institution or society represented by the plaintiff—as stated by Justice Holmes in *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*,

208 U. S. 554, 559 (28 Sup. Ct. 350, 52 L. Ed. 616), 'so as to give the antidote with the bane.'

"* * * And it does not appear necessary that the parties be in competitive businesses or that the injury has already occurred. It is sufficient if the names, although not identical, are sufficiently similar to cause confusion and injury. (*Colorado National Co. v. Colorado Nat. Bank of Denver*, 95 Colo. 386 (36 Pac. (2d) 454); *Standard Oil Co. of New Mexico, Inc. v. Standard Oil Co. of California* (C.C.A.), 56 Fed. (2d) 973; see note with cases cited, 66 A.L.R., at pp. 967, 968, 971, 972.) The general principle is thus stated in *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94, at page 97; 'Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. *We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law.*' (See, also, 26 R.C.L., p. 888, and cases cited in the note.)" (Italics added.)

Cases factually analogous to the case at bar.

And in cases where the evidence has been similar to that presented in the case at bar it has been uniformly held by the Courts, including those of California, that such evidence entitled the plaintiff to relief. The cases which have dealt with the problem establish that a plaintiff who has first used a particular name in a business is entitled to protect his good will and reputation against a later comer desig-

nating his business by the same or a similar name even though the stores or places of business of the parties are in different communities, if the later comer is doing business within the actual trading territory or the normal area of expansion of the plaintiff.

Such a factual situation was considered by the California District Court of Appeal in the case of *George H. Benioff v. David Benioff and Fred Benioff*, 64 Cal. App. 745, 222 Pac. 835. In that case the plaintiffs, beginning in 1915, had conducted a retail fur business in San Francisco under the name of "Hudson Bay Fur Co." The business was extensively advertised in San Francisco and Oakland. Some circulars and some catalogues soliciting a mail order business were mailed as far south as Bakersfield. No attempt was ever made to advertise the business locally in Los Angeles. Plaintiffs had made sales to people who resided north and south of San Francisco, some in Los Angeles, and some business went out on mail orders. While plaintiffs were investigating certain property in Los Angeles in February 1921 for leasing and opening a store in Los Angeles, the defendants started a Hudson Bay Fur Co. to engage in the retail fur business with its principal place of business in Los Angeles. Plaintiffs sued and obtained an injunction enjoining defendants from engaging in the fur business in California under the name Hudson Bay. Defendants appealed, contending that the injunction was erroneous insofar as it applied to Los Angeles. The judgment was upheld on appeal, the Court stating (p. 747):

“Appellants’ main contention is that respondents’ business is confined *principally* to the San Francisco bay district and that their market does not extend to Los Angeles; that, therefore, any business conducted by appellants in Los Angeles would not be in competition with respondents at all, and hence could not be *unfair* competition. They then argue that the right to protection of a trade name does not extend beyond the market of the person claiming the same, and that, therefore, respondents are not entitled to protection against the use by others of their trade name in Los Angeles.

“We agree with the rule stated by appellants, but in its application they have assumed a state of facts directly contrary to the findings of the trial court. The findings are in part to the effect that plaintiffs’ business extends over the whole of the state of California and that they have customers in all the principal cities of the state; that the business conducted by the said plaintiffs has been and is known to all persons dealing with them and throughout the whole of the state of California as the Hudson Bay Fur Company; ‘that as a result of the care, attention, skill and strict adherence to their said business and through their honesty and fair dealing the said plaintiffs have under the name of Hudson Bay Fur Company established throughout the state of California a wide and honorable reputation as a fair and reliable business and firm to deal with and the said plaintiffs under said trade name now enjoy throughout the whole of the state of California, and elsewhere, a good reputation and credit.’ * * *

“We are satisfied upon reviewing the evidence that it supports these findings, and that the two concerns, engaged in the same character of business, under identical names would be competing for the same patronage. It can scarcely be doubted that this would result in deceiving and confusing the public to respondent’s detriment. This is held to be unfair competition. In the interest of fair dealing, courts of equity will protect the person first in the field doing business under a given name to the extent necessary to prevent deceit and fraud upon his business and upon the public. (*Yellow Cab Co. of San Diego v. Sachs*, 191 Cal. 238 (216 Pac. 33).) For this purpose the second comer may be enjoined from using the name. (*Morton v. Morton*, 148 Cal. 142 (1 L.R.A. (N.S.) 660, 82 Pac. 664); *Dodge Stationery Co. v. Dodge*, 145 Cal. 380 (78 Pac. 879); *Hainque v. Cyclops Iron Works*, 136 Cal. 351 (68 Pac. 1014); *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357; *Ball v. Best*, 135 Fed. 434; *Juvenile Shoe Co. v. Federal Trade Commission*, 289 Fed. 57); and this is true even though, as, in this case, the principal places of business are at a considerable distance from each other. (*Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357, 371; *Northwestern Knitting Co. v. Garon*, 112 Minn. 321 (128 N. W. 288, 291); *Ball v. Best*, 135 Fed. 434; *Juvenile Shoe Co. v. Federal Trade Commission*, 289 Fed. 57.)” (Italics added.)

We have not overlooked the fact that the decision in *Benioff v. Benioff* was based upon findings of the trial Court in favor of the plaintiff. Nevertheless, that decision is applicable to the case at bar because,

as pointed out above under the evidence contained in the record the trial Court exceeded its discretion in failing to find (1) that appellant's business extended into the cities up and down the San Francisco peninsula, including San Jose; (2) that appellant's business is known and referred to as "Lerner's"; (3) that appellant has established a valuable reputation and good will for its stores; (4) that appellant and appellee compete for patronage. The decision in *Benioff v. Benioff* shows clearly that such matters constitute most material issues and that the trial Court erred to the substantial prejudice of appellant in its handling of the evidence and findings relating thereto, as has been pointed out hereinabove.

Likewise, the fact that in the *Benioff* case it appeared that some business was solicited and mailed out to southern California as mail order business, does not differentiate that case from the instant one. The decision in favor of the plaintiff was sustained upon the principle, equally applicable to the case at bar, that in spite of the geographical distance between the two businesses, the plaintiff was regularly doing some business with the residents of southern California, and was therefore entitled to an injunction against a later comer entering that trading area under a confusingly similar name.

The problem was considered and similarly determined by the Supreme Court of Washington in *Groceteria Stores v. Tebbetts*, 162 Pac. 54. The facts in that case are stated in the opinion of the Court and were as follows:

“This action was brought by appellant, a corporation, for the purpose of restraining respondent from in any manner using the trademark or tradename ‘Grocceteria.’ The complaint alleges that appellant has opened up several grocery stores in the city of Seattle, which are designated as ‘Grocceteria No. 1,’ ‘Grocceteria No. 2,’ and ‘Grocceteria No. 3;’ *that it has been selecting and procuring leasehold interests in the city of Tacoma preparatory to going into business in that city, and that it has been doing business from its Seattle office with people in the city of Tacoma;* that appellant’s stores are operated in such a manner that no deliveries are made to purchasers and no clerks employed, each purchaser making his selection and paying for the same on his exit, thus greatly reducing the operating expenses of the store and allowing appellant to sell groceries at a greatly reduced price, and that the trademark of appellant is marked upon the container in which the goods are sold; that appellant is the first person in the state of Washington to use the method of operating a grocery store as described above, and has used large sums of money to advertise the same; that it is the first person in the state of Washington to use the word ‘grocceteria’ as a trademark or tradename, and that on November 10, 1915, the secretary of state granted a certificate of registration of such trademark to appellant; that respondent M. C. Tebbetts is engaged in conducting a grocery business in the city of Tacoma, and has placed on the windows of his store large signs containing the words ‘Pacific Grocceteria,’ *giving particular prominence to the word ‘grocceteria;’* that respondent is using the trademark and tradename of appellant in order

to convey to the public the idea that he is merchandising and trading in the goods of the plaintiff, and is attaching the name and word 'Groceries' to the goods sold in respondent's store. A demurrer to this complaint was sustained. As appellant elected to stand upon the complaint, a judgment of dismissal was entered from which the appeal is taken." (*Italics added.*)

The trial Court denied plaintiff any relief, and plaintiff appealed. The Supreme Court of Washington reversed the judgment, and held:

"Relying on the rule announced in *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 35 L.R.A. (N. S.) 251, 110 Pac. 23, respondent asserts that, as appellant has established no place of business in the city of Tacoma *and has done no business there*, it is not entitled to the exclusive use of the word 'groceries' in that community. It is true, in *Eastern Outfitting Co. v. Manheim*, we held that the fact to be ascertained was, what is the market of the complaining party and his protection in the use of his tradename is coextensive with his market. The court then found that the plaintiff's place of business was in Seattle, and it was doing no business whatever in Spokane, and was therefore not entitled to the use of the tradename in Spokane as against defendant, who had, at a large expense, established a business in Spokane. The rule as laid down in the *Eastern Outfitting Co.* case, *supra*, in any event is not applicable here, as it is alleged in the complaint, and admitted by the demurrer, that *appellant is doing business with the people of Tacoma, which makes Tacoma a part of its market.*

“It is not here intended to enjoin and prohibit the method of doing business pursued by respondent, but only the piratical use of the tradename or trademark and label ‘Grocceteria’ within the state.

“The judgment is reversed, and the cause remanded for further proceedings not inconsistent herewith.” (*Italics added.*)

A leading case is *Sweet Sixteen Co. v. Sweet “16” Shop, Inc.*, 8 Cir., 15 F. (2d) 920. In that case the essential facts are also stated in the opinion of the Court and were as follows (p. 920):

“The record is long, but the salient facts are fairly simple and not involved. They run thus: In the year 1916, plaintiff began business in San Francisco, as a dealer in women’s ready-to-wear clothing, under the name of Sweet Sixteen Company, a corporation. In its business and advertisements it referred to many of its garments and goods as ‘Sweet Sixteens,’ it designated its system of dealing as the ‘Sweet Sixteen System,’ and it sold many of the garments kept for sale by it at \$16 per garment. In the beginning it had but one store. It prospered in such wise as that, by the year 1921, it was the owner of five stores, two in San Francisco, and the others in three other cities of the coast states, namely, Los Angeles, Portland and Seattle, as also an office and general purchasing agency in New York. It was advertising its business in divers trade journals and in the daily newspapers of the several cities in which its stores were located. Some 75 of these newspapers were daily sold and read in Utah. Its annual advertising expenditures in the year last

mentioned exceeded \$30,000, and in the year in which this suit was begun, amounted to more than \$120,000. It had a very considerable mail order business, through which it sold some goods in some 12 or 15 different states, among which was the state of Utah. *While the business done thus in the state of Utah was, in proportion to its total business, negligible, it was making efforts to increase it, and to this end, in the year 1921, it sent some 1,500 of its printed catalogues into that state. In the year 1922 it supplemented this selling and advertising campaign in the state of Utah by distributing therein pictures and drawings of many of the articles kept by it for sale.*

*“Prior to 1923, and about the year 1921, it put on foot tentative plans to rent and establish a store in Salt Lake City, Utah. These plans were not consummated, however, up to April 3, 1923, when defendant started in Salt Lake City a wholly similar business (save that it does not particularly cater to the mail order business), dealing in like merchandise, which defendant ran and operated under the name of the Sweet ‘16’ Shop, Inc. * * * there is left no question in the case that defendants assumed this name with full knowledge of its use by plaintiff, if such fact shall be of controlling importance.*

“The record discloses fairly numerous instances wherein dealers, customers, and potential customers were misled by the similarity of names into mistaking defendants’ business for that of plaintiff. It is well settled that, both in cases of unfair competition unaccompanied with trade-mark infringement, and in cases of infringement of technical or common-law trade-marks, the essence

of the wrong consists in the sale or mistaking of the goods of one dealer or manufacturer for those of another, and that this essential element is the same in both classes of cases. * * *

“In the instant case defendants Provol and Wrigley, while they were copartners, before they organized defendant corporation and before they actually began business, had notice of plaintiff’s prior adoption, appropriation, and use of the words ‘Sweet Sixteen’ to designate its business, and as a trade-mark on the goods in which plaintiff was dealing. The trial court so found, and the facts in evidence conclusively so disclose. Not only is this conclusively shown by the telegram sent to Provol, notice to whom as a partner was notice to Wrigley (20 R.C.L. 355), but it is corroborated by other evidence in the case, some of which is suggestive, if not sinister. For example, they saw fit to make a slight change in the manner of representing the expression ‘Sixteen’ by the use of quoted numerals instead of spelling the word out, as plaintiff does; before they began business, and before they had ever actually used this mark, they registered it as a trade-mark with the secretary of state of Utah. Aside from the finding of the trial court, and of the conclusive evidence of prior notice, the two latter precautions are such as would not ordinarily be taken by those who were wholly innocent of plaintiff’s existence and of its use of the mark in controversy.

“Apposite to the exception of prior appropriation of the field of trade and of the right to a natural expansion into such field, the facts, as already said, are that plaintiff in 1921, and some two

years before defendant began business under the style complained of here, had sent some 1,500 of its catalogues into Utah and to Salt Lake City; in 1922 it supplemented these catalogues by sending into that state pictures and drawings of many of the goods kept and sold by it; and it had sold to citizens of Utah at Salt Lake City some goods and had filled some mail orders there; in all, making some six or eight sales in one or the other of the above ways. Newspapers containing its advertisements had constantly been sold in Salt Lake City for a number of years before defendants did the act here complained of. Plaintiff avers, and the evidence discloses, its intention to establish a store in Utah, and to this end it had already taken tentative steps till the acts of defendants forestalled it.

“From the above cases and authorities, and many others which could be cited, it would seem to follow inevitably, that if ‘a single instance of user, with accompanying circumstances evidencing an intent to establish the right to a trademark’ (Hopkins on Trademarks, *supra*), be sufficient to establish such right in San Francisco, as against an alleged infringer in that city, then six or eight instances of such use, by sales of trade-marked goods, accompanied by fairly extensive advertisements in certain newspapers circulated and read in Salt Lake City, and the distribution therein of many catalogues ought, *ceteris paribus*, to be sufficient user, as against a subsequent appropriator, to constitute infringement by the latter in Salt Lake City.

“Considering the case as it was presented, and without reference to any other questions, save

those mooted in the pleadings, the briefs, and arguments, we are of opinion that the case should be reversed and remanded, with directions to grant to plaintiff the relief for which it prays. Let an order be entered accordingly, with costs to be taxed in favor of appellant." (Italics added.)

In the *Sweet Sixteen Co.* case, six or eight sales by the plaintiff, accompanied by attempts through advertising to extend its business in Utah, were held to constitute prior entry into the area and to give the right to the plaintiff to expand therein without competition from a business similarly designated. Appellant's case for an injunction is even stronger—for appellant had an established, regular business with residents of San Jose and vicinity, and hundreds of transactions per year with such persons. Appellant's business was known and patronized by such persons, prior to the time appellee designated his store as "Lerner's", without the necessity of appellant advertising in newspapers. Appellant was therefore first in such trading area, and entitled to complete its plans for expansion therein without competition from another business named "Lerner's".

In *Western Auto Supply Co. v. Knox*, 10 Cir., 93 F. (2d) 850, plaintiff alleged: "That it operated a growing chain of stores, which had started in Kansas in 1909, and had spread throughout the west with stores in Tulsa and in Oklahoma City; that it mailed catalogues throughout the State of Oklahoma and had established a mail order business over the entire state;

that in 1933 defendant established a store in Enid, Oklahoma, under the name Western Auto Salvage Company, in which he sold automobile accessories and supplies; that defendant then opened additional stores in Perry, Kingfisher, Woodward, Ponca City and Blackwell, all in Oklahoma; that defendant's name is confusingly similar to plaintiff's trade name of "Western Auto Stores".

A separate complaint considered by the Circuit Court of Appeals in the same opinion alleged a similar case against another defendant who opened stores under the name of Western Auto Parts Company—also in cities other than Tulsa or Oklahoma City.

The trial Court dismissed both complaints and plaintiff appealed.

The Circuit Court of Appeals reversed the order of the trial Court, and directed that the complaints be reinstated, holding (p. 852):

"Argument is advanced that the decree should be upheld because the parties are not direct competitors. Neither defendant operates a store in Tulsa or Oklahoma City, and the defendant in the first case deals in part in secondhand merchandise while plaintiff vends only new merchandise. But both defendants conduct their business in closely connected towns in Oklahoma; *they draw trade from territory not remote from the stores of plaintiff* and from territory included in the mail order system of plaintiff; and the second-hand merchandise consists of accessories and parts for all makes of automobiles. The right to restrain a junior in the field is not confined to

cases of actual market competition between identical products. It extends to a case in which one trader represents his products as those of another. A merchant has a sufficient economic interest in his trade-name to restrain another from exploiting it in the sale of his merchandise, even though the two are not engaged in the manufacture or distribution of the identical or like products. *Standard Oil Co. of New Mexico v. Standard Oil Co. of California*, *supra*; *Yale Electric Corp. v. Robertson*, 2 Cir., 26 F. 2d 972; *Wisconsin Electric Co. v. Dumore Co.*, 6 Cir., 35 F. 2d 555; *Horlick's Malted Milk Corp. v. Horluck's Inc.*, 9 Cir., 59 F. 2d 13; *Phillips v. Governor & Co.*, *supra*; *Colorado Nat. Co. v. Colorado Nat. Bank*, 95 Colo. 386, 36 P. 2d 454; *Churchill Downs Distilling Co. v. Churchill Downs, Inc.*, 262 Ky. 567, 90 S. W. 2d 1041. The facts alleged in the bills and admitted by the motions bring the cases well within the rule enunciated in these authorities.

“The decrees are severally reversed and the causes remanded, with direction to deny the motions to dismiss the bills.” (*Italics added.*)

It is worthy of note that the principle of decision applied in the foregoing case, to wit, that actual market competition is not necessary in this class of case in order to entitle a plaintiff to relief, is identical with the rule applied by this Court in the following cases:

Del Monte Special Food Co. v. California Packing Corp., 34 F. (2d) 774;

Phillips v. Governor & Co., 79 F. (2d) 971.

The recent case of *Brooks Bros. v. Brooks Clothing of California, Ltd.*, 60 F. Supp. 442, decided by the District Court for the Southern District of California, is quite similar in many respects to the instant case, although it also presented a number of questions not present here. The plaintiff, Brooks Brothers, a corporation with its principal place of business in New York City, sued and obtained an injunction restraining unfair competition in the use of the name "Brooks" by the defendant Brooks Clothing of California, Ltd., whose principal place of business was in Los Angeles. Both parties sell chiefly men's wearing apparel. Plaintiff's only retail store was in New York City where its predecessors had begun its business early in the nineteenth century. Plaintiff's business in other parts of the country was carried on by mail order and by traveling representatives who called upon only a select clientele. However, in 1939, long after defendant began business, plaintiff established a sales agency in San Francisco and another one in Los Angeles. Defendant began business in 1924 under the partnership name of "Brooks Clothing Company" with a single retail store, and later incorporated. That business was developed so that at the time of the trial defendant was operating a chain of 15 stores all located in the populous cities in Southern California, except for one store which was located in San Jose. Defendant did not use its full name on its store fronts or on its advertising; instead it used only the word "Brooks".

In the *Brooks* case the trial Court determined, as the opinion shows, that the defendant's original use of the name "Brooks" was without wrongful intent and that plaintiff had not shown any actual diversion of business. The defendant in that case, as in the case at bar, denied that there was any competition between its business and that of plaintiff, both by reason of the fact that plaintiff had not had any established place of business in California prior to the time that defendant opened its stores in this State, and that the two businesses catered to different classes of trade.

In issuing an injunction in favor of the plaintiff, the Court rendered an extended opinion in which the law as established in this Ninth Circuit is carefully analyzed. With respect to certain of the points which are applicable under the evidence and the issues contained in the record in the case at bar, the opinion in the *Brooks* case holds as follows:

(p. 450) :

"Consequently, the courts, in both trademark and unfair competition cases, have held that where the dominant portion of a trademark, tradename or business has become identified in the mind of the public with the first user, he will be protected in the use of the name, even against a new-comer having the same surname."

(p. 453) :

"And, while the plaintiff's top prices may be higher, it does sell men's clothing within the lower range of the defendant. This fact so ob-

viously means competition that it would seem unnecessary to advert to it. Yet, the ardor of counsel for defendant in contending that there is no actual competition calls for comment. They postulate a differentiation between the businesses based upon the dissimilarity of the merchandise of the two parties and its 'appeal' to the different social groups from which they seek custom. You cannot divide the clothing business into categories, according to the social group on which it may depend for patronage. It may well be that a purchaser of clothes chooses to go to one store, rather than to another, because it carries the type of clothes he likes, just as a person may go to a tailor who charges \$135 to \$150 for a suit of clothes, while another prefers to patronize one who charges \$75. But, just as both tailors are in 'the tailoring business', regardless of the price, so are both establishments which sell ready-made clothing in the clothing business. To use a phrase made famous by an American humorist, just as 'Pigs is Pigs', 'Clothes is clothes'. They do not cease to be such because they appeal to one social group rather than another. Nor do the persons engaged in selling them to one rather than another cease to be in the clothing business competitively. Even if the goods be not in competition, the law protects a merchant in his interest 'in other goods, services or businesses which, in view of the designation used by the actor, are likely to be regarded by prospective purchasers as associated with the source identified by the trademark or tradename.' Here, as the evidence shows, through long use, the word 'Brooks' has become identified with the clothes sold by the

plaintiff. And the law does not require that there be actual diversion of trade. It is sufficient that the imitation be of a character which is likely to have that result. *In considering a case like this, we must take into consideration the habits of the American buying public. Just as Americans are prone to abbreviate names, and Young Men's Christian Association became, first, the Y. M. C. A., and later—especially among the soldiers—the Y, so do they abbreviate longer business names. And Sears, Roebuck & Co. become Sears, J. W. Robinson Co. becomes Robinson's, R. H. Macy & Co. becomes Macy's, John Wanamaker becomes Wanamaker's, Tiffany & Co. becomes Tiffany's, and John B. Stetson becomes Stetson's. More, if a person has achieved successful manufacturing or merchandising in a particular field, the average American, who constitutes our buying public, will identify the name with the product. So Tiffany spells jewelry, Waterman, fountain pens, Ford and Chrysler, automobiles, Hoover, cleaners, Wal-tham and Elgin, watches, Standard, oil products, Stetson, hats. When, over the radio, we hear the announcement that the Standard Symphony Hour will be heard, we need not be told that it is sponsored by the Standard Oil Company. When a person informs us that he has bought a Ford, he need not add that it was an automobile. And when he buys a Stetson, we know that he is buying a hat. By the same token, one would close his eyes to reality if, in the face of the record in this case, one would hold that 'Brooks' does not mean the clothes of 'Brooks Brothers' because its customers come from 'the classes' rather than 'the masses.'* Ours is an unstratified society with

constant mobility of persons. Absent a 'caste' system, there can be no 'caste' in merchandising. As prospective customers, 'the Colonel's lady and Judy O'Grady' (or their male equivalents) 'are sisters' (or brothers) 'under the skin.'

The conclusion is, therefore, inescapable that the plaintiff and the defendant are competing in selling clothes and that, in this field, the word 'Brooks' has acquired a secondary meaning to the benefit of which the plaintiff alone is entitled, and in the protection of which, courts will aid."

(p. 461):

"The assumption that because the defendant, beginning in 1924, operated stores in California and used 'Brooks' in its business name, it acquired priority in the local market, might apply to one who came later. But 'Brooks Brothers' were first in the California trade long before that date. So the argument based on this case cannot hold, unless we adopt the untenable theory that, because they appealed to a different clientele, the doctrine of 'confusion of source' does not apply." (Italics added.)

It is to be noted that in determining that the plaintiff in the *Brooks* case was entitled to an injunction, the Court did not differentiate between particular cities in California since it appeared that the plaintiff had been first in the field in this State. Thus the defendant's "Brooks" store in San Jose was the closest place of business in northern California to plaintiff's sales agency in San Francisco. In the case at bar the evidence clearly established the existence all up and down the San Francisco peninsula, including San

Jose, of customers of appellant and a wide acquaintance on the part of the purchasing public with its stores. The distance between San Francisco and San Jose is quite as immaterial in the instant case as the Court in the *Brooks* case considered it to be.

Likewise worthy of note is the Court's reference to the well known fact that it is the habit of the buying public to know and refer to well known business concerns by an abbreviation of the name, and in the possessive,—such as “Macy's”. The evidence in the instant case demonstrates that appellant is known to millions of customers, and that the majority of persons know and refer to it as “Lerner's”. As the Court reasoned in the *Brooks* case, appellee's store was bound to be considered as connected with appellant, no matter what “class” of customers appellee dealt with.

In *Rhea v. Bacon*, 5 Cir., 87 F. (2d) 976, it appeared that for many years prior to 1935, plaintiff and his predecessors had operated a hotel known as “Inn-By-The-Sea”, located on the Gulf of Mexico on the Mississippi coast. It had been widely advertised and was nationally known. In 1935 the defendants opened a hotel on the Gulf of Mexico near Fort Walton, Florida, under the name “Inn-By-The-Sea”. Both hotels are on the Scenic Highway along the coast of the Gulf of Mexico, about 200 miles apart. The defendant also adopted certain features of construction imitative of plaintiff's hotel. The District Court dismissed plaintiff's complaint to enjoin defendant from using said name. Plaintiff appealed and the Circuit Court of Appeals in reversing the District Court held (p. 977):

“The real controversy in this case arises out of the distance between the two hotels, but, since the parties solicit the same customers and cater to the same trade, they come into direct competition with each other, and the distance is not a defense in equity to appellants’ suit, as it is not a barrier in fact to appellants’ injury by appellees.”

In *Terminal Barber Shops, Inc. v. Zoberg*, 2 Cir., 28 F. (2d) 807, the plaintiff built up a valuable good will in the operation of barber shops in New York City under the name “Terminal”. Plaintiff had no place of business in New Jersey. Defendant began operating in New Jersey as “Terminal Beauty Parlors”, and later opened a shop in New York. The district judge confined the plaintiff’s relief to an injunction directed against defendant’s operations in New York, although some of plaintiff’s business came from New Jersey and its name was well known there. Plaintiff appealed. The Circuit Court of Appeals enlarged the relief granted plaintiff so as to include New Jersey as well as New York, holding (p. 809):

“The plaintiff has constantly extended the use of its name within the territory where the defendants are now carrying on business, and there was extensive knowledge of plaintiff’s name and what it stood for in the matter of efficient service in the field where the defendants subsequently came to establish themselves. *As a subsequent user of the name, endeavoring to take the benefit of the reputation of the plaintiff’s goods in this way, or to forestall the extension of its trade, they committed an injury for which equity will afford injunctive relief even though the trade-mark has not been registered under the statute.* The de-

fendants are unquestionably attempting to benefit by the reputation of the plaintiff.

“In *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 416, 36 S. Ct. 357, 361 (60 L. Ed. 713), the Supreme Court said that ‘since it is the trade, and not the mark, that is to be protected, the trade-mark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader’s goods have become known, and identified by his use of the mark,’ and further that, where two parties independently are employing the same mark upon goods of the same class, in separate markets, one wholly remote from the other, prior appropriation is immaterial, unless it appears that the second adopter has selected the mark with the same design inimical to the interest of the first user, so as to take the benefit of his reputation for his goods or to forestall the expansion of his trade. Whether the name of a corporation be recorded as a trade-mark or trade-name, or both, the law affords protection against its appropriation, where the general purpose thereof is to obtain a competitor’s business, which he has established or which might be justly in the field of the expansion of his business. *American Steel Foundries v. Robertson*, 269 U. S. 372, 46 S. Ct. 160, 70 L. Ed. 317.

“In *Sweet Sixteen Co. v. Sweet ‘16’ Shop, Inc.* (C.C.A.) 15 F. (2d) 920, the plaintiff had established its business for women’s retail clothing under the name ‘Sweet Sixteen Co.,’ with shops in San Francisco, Los Angeles, Portland, and Seattle. The defendant incorporated under the laws of Utah and began planning the establishment of a store in Salt Lake City using a similar

name 'Sweet "16" Shop.' The argument was there advanced that the defendant had started in a distant city, but the court held that although the plaintiff had no shop in Utah, it should be protected by injunction against the use by defendant of its name. In *Buckspan v. Hudson Bay Co.* (C.C.A.) 22 F. (2d) 721, an injunction was granted against the name of 'Hudson Bay Fur Company' by a firm in Dallas, Texas, where the plaintiff had no place of business and where the defendant was engaged in the sale of manufactured furs and fur garments, whereas the plaintiff, which had been in existence since 1670, had established a world business, with a valuable good will and having periodical sales in London, which were attended by buyers from the United States, and where the plaintiff dealt in raw furs. The defendant had been in business for more than 10 years, but the court held that the trade-name, having a deceptive similarity to that of the plaintiff, enabled the defendant to sell furs as those of the plaintiff, thereby deceiving the public. The plaintiff had no place of business in the United States, but had a market here. In the case under consideration, the plaintiff had no place of business in New Jersey, but had patrons and a good will established there. See, also, *Rice & Hutchins v. Vera Shoe Co.* (C.C.A.) 290 F. 124; *Hub Clothing Co. v. Cohen*, 270 Pa. 487, 113 A. 677; *British-American Tobacco Co. v. British-American Cigar Stores Co.* (C.C.A.) 211 F. 933, Ann. Cas. 1915B, 363.

"* * * After 20 years of industry and erudition, and the expenditure of large sums of money, plaintiff has established an extensive and valuable good will, using the mark 'Terminal' throughout

this period of years. It has become so well defined and associated with the plaintiff's business that to permit another to use the word 'Terminal' would be a serious and constant injury to the plaintiff's business, and must be prohibited. The harm done is irreparable, and the plaintiff must be protected in the time intervening between its application for a preliminary injunction and final hearing. The decree will be modified, so as to enjoin the defendants' use of the word 'Terminal,' alone or in combination with other words, as a trade-name under which they shall conduct their business in both New Jersey and New York." (Italics added.)

In *Rainbow Shops v. Rainbow Specialty Shops* (1941), 27 N.Y.S. (2d) 390, the facts showed, that plaintiff and its predecessors, since 1921, had sold ladies' apparel and specialties under the name "The Rainbow Shop" and "Rainbow Shop", that plaintiff had six stores in Brooklyn; that its name was well known, that plaintiff formerly conducted a branch at Hempstead, Long Island, and was presently seeking to locate stores in Jamaica, Hempstead and Great Neck, and that from 20 to 25 per cent of plaintiff's business emanated from that general territory.

In 1934 defendants opened a store in Great Neck, and later a store in Manhasset, Nassau County, Long Island, called "The Rainbow Specialty Shop" or "The Rainbow Shop".

The Court, in enjoining defendant's use of its name, held:

"During the course of the trial I intimated that a prior trader is entitled to equitable protection in the exclusive use of his trade name not only

within the immediate locality where his business has been previously conducted but also, as here within such territory as may reasonably be expected to constitute a likely field of normal expansion. I am inclined to adhere to that even after a studied reflection. See *Ball v. Broadway Bazaar*, 194 N. Y. 429, 87 N. E. 674; *Stewarts Sandwiches, Inc. v. Seward's Cafeteria, Inc.*, D. C. 60 F. (2d) 981; 63 C.J. p. 444."

In *Stewarts Sandwiches, Inc. v. Seward's Cafeteria, Inc.*, 60 F. (2d) 981 (D. Ct. N.Y.), the plaintiff operated cafeterias known as "Stewarts". Defendant opened a cafeteria on 149th St., New York, under the name of "Sewards". Defendant placed in front of its cafeteria a sign reading "Coming Soon! Another Seward's Cafeteria". In granting an injunction the District Court held (p. 981):

"The affidavits do not convincingly establish that defendant dressed its store front, or furnished its cafeteria so as to simulate any distinctive appearance common to the plaintiff's chain of cafeterias, or that either the plaintiff or defendant dressed their cafeterias in any distinctive manner. *It appears, however, that the defendant did place in front of its premises, No. 378 East 149th Street, in the borough of the Bronx, for a lease of which the plaintiff had prior thereto negotiated, a sign reading: 'Coming Soon! Another Seward's Cafeteria.'* Defendant in fact never had conducted a cafeteria under this name. Plaintiff had been operating at great expense and with considerable success nine cafeterias with which the name 'Stewart's' had become associated, serving daily in the city of New York approximately 38,000 people and doing a business of about \$2,800,000 annually.

*“The only purpose which defendant could have had in thus falsely advertising must have been to give to the public the impression that one of plaintiff’s cafeterias was about to be opened on the premises. * * **

“The fact that the defendant’s cafeteria is located on 149th street and that plaintiff’s nearest cafeteria is located at 50th street does not place defendant’s cafeteria beyond the area in which plaintiff is entitled to protection. Especially in view of the fact that the cafeterias are in a populous city closely knit by swift means of transportation and that plaintiff is operating an expanding system of chain stores, it is entitled to protection over the ‘territory which may be reasonably expected to be within the normal expansion of the business.’ Western Oil Refining Co. v. Jones (C.C.A.) 27 F. (2d) 205.” (Italics added.)

There are a number of additional authorities which support and apply the rule as stated and applied in the above decided cases. They are:

R. H. Macy & Co., Inc., v. Colorado Clothing Mfg. Co., 10 Cir., 68 F. (2d) 690;

White Tower System v. White Castle System, 6 Cir., 90 F. (2d) 67;

Western Auto Supply Co. v. Western Auto Supply Co. (D.Ct. N.H.), 13 F. Supp. 525;

Grocers Baking Co. v. Sigler, 6 Cir., 132 Fed. (2d) 498, 499;

Brass Rail, Inc. v. Ye Brass Rail of Massachusetts, Inc. (D. Ct. Mass.), 43 F. Supp. 671;

Adam Hat Stores v. Scherper (D. Ct. Wis.), 45
F. Supp. 804;
Stork Restaurant, Inc. v. Marcus (D. Ct. Pa.),
36 F. Supp. 90;
Hub Clothing Co. v. Cohen (Pa.), 113 A. 677.

We have cited and quoted at length from the above decisions, in order to show how fully appellant's legal position is supported by the authorities. Such authorities lead to the conclusion aptly stated by the Court in *Bill's Gay Nineties, Inc. v. Fischer*, 41 N. Y. Supp. (2d) 234, 236, that:

"Nothing is more firmly grounded today than, that distance is not a defense."

Under the evidence and the law, appellant's stores, as an expanding group of stores, designated and known to the public by the name "Lerner's" is entitled to the protection of that name as against appellee both by virtue of the fact that appellant has an established trade in San Jose and vicinity and the further fact that that area represents a territory into which appellant normally would expand and where it planned to locate one of such stores. Appellant's business in San Jose and surrounding communities represents a small percentage of its total business, but appellant continually obtains a portion of its business from that area and has many regular customers residing therein. The cited authorities make it clear that appellant's rights are based upon the fact that it was first to do business with the people of San Jose and vicinity and that that area is within the area of its normal, planned expan-

sion, rather than upon a showing that appellant does any particular amount of business in that territory.

Moreover, the rule established by the authorities works no hardship or injustice upon a newcomer in business. Neither his right to do business nor his right to conduct it under his own name is placed in jeopardy. The rule merely requires that he build his business upon its own merit rather than upon the basis of what other persons have done at a prior date through effort and the investment of their resources. Appellee, upon opening his store, was as likely to succeed under his name of "Wilfred A. Lerner" as under the designation which he selected. But he was not justified in using a designation which would operate to obtain for himself the benefit of appellant's established reputation. And, as the *Brooks*, the *Macy* and other cases show, a concern such as appellant which has pioneered and established a valuable business under the name of "Lerner" in the line of business into which appellee was an untried newcomer, might find its good will constantly threatened and subjected to injury at the hands of persons such as appellee, unless such newcomer was under the duty announced in the authorities, to wit, to adopt and use a name which serves to distinguish clearly between the established and the new business.

Appellee submits that both on principle and under the rule of law established by the authorities, appellant is entitled to an injunction against appellee in the case at bar, and that the trial Court erred in denying appellant any relief.

IV. APPELLEE DID NOT ACT IN GOOD FAITH IN DESIGNATING HIS STORE AS "LERNER'S" AND SHOULD BE RESTRAINED FROM USING THE NAME "LERNER" AS HIS TRADE NAME. THE LEAST RELIEF TO WHICH APPELLANT IS ENTITLED IS AN INJUNCTION REQUIRING APPELLEE TO REFRAIN FROM USING THE NAME "LERNER" UNLESS IT IS ACCOMPANIED BY DISTINGUISHING FEATURES DISPLAYED WITH EQUAL PROMINENCE.

Appellant alleged (Tr. 6) and endeavored to prove by evidence discussed hereinabove, that appellee deliberately attempted to obtain the benefit of appellant's established reputation and good will by designating his store as "Lerner's". The evidence showed that appellee's background did not make his name a recognized one in San Jose or in the retail business anywhere, that he well knew of appellant's business and stores, that he was unable to give any logical explanation for adoption of the designation "Lerner's", that he accompanied the opening of his store with misleading newspaper advertisements, and that he continued to refuse to give equal prominence to his given name or any other feature which would distinguish his store from appellant's stores.

The first advertisement which appellee published in the San Jose newspapers stated (Tr. 12):

"Ladies
For You Soon
Lerner's
70 South First St.
Watch
Wait"

This was followed by an advertisement which set forth that (Tr. 14):

“LERNER’S

70 S. First St., San Jose

Makes a Spectacular Entrance!”

After his store had been opened approximately one week, appellee’s newspaper advertisement (Tr. 15) expressed appreciation for acceptance of the new store and closed with the words:

“As always—Lerner’s”

Appellant submits that the only fair and logical inference to be drawn from the evidence is that appellee, a newcomer in the retail business, deliberately sought to obtain the benefit of appellant’s established reputation and good will, and that the trial Court erred in finding (Tr. 33, Finding V) that appellee acted in good faith in designating his store as “Lerner’s” and in his conduct in connection therewith. An advertisement along the same lines as appellee’s “Ladies, Watch, Wait” advertisement constituted a part of the evidence against an alleged unfair trader in the case of *Stewarts Sandwiches, Inc., v. Seward’s Cafeteria, Inc.*, supra, 60 F. (2d) 981, and the Court, in holding that an injunction should be issued, commented on the defendant’s advertisement as follows (p. 981):

“The only purpose which defendant could have had in thus falsely advertising must have been to give to the public the impression that one of plaintiff’s cafeterias was about to be opened on the premises * * *”

The Court’s statement in that case is equally applicable to appellant’s sequence of advertisements in the case at bar. A person entering for the first time

a business in which his name is unknown, would not herald the arrival of such new business solely by reference to a well-established name, nor close his advertisements with the words, "As always", unless his purpose was to create an impression which is not in consonance with the facts, and to obtain the benefit of the good will which is attached to such well-established name. Appellant earnestly contends that under the evidence, appellee should be enjoined from using the name "Lerner" or even the name "Wilfred Lerner" as his trade name, as has been ruled with respect to deliberate unfair competitors by the cases which have considered the matter.

J. A. Dougherty's Sons, Inc. v. Dougherty, 36 F. Supp. 149;

Goldberg v. Goldberg (Ga.), 126 S. E. 823;

P. J. Tierney Sons, Inc. v. Tierney Bros., Inc. (App. Div.), 224 N. Y. S. 144;

Westphal v. Westphal (App. Div.), 215 N. Y. S. 4.

However, if it is assumed, contrary to what appellant believes to be the sound conclusion, that the trial Court did not abuse its discretion in concluding that appellee acted in good faith when he chose and used the designation "Lerner's", appellant was nevertheless under the evidence and under the authorities entitled to an injunction which would serve to prevent confusion as to the relationship of the two businesses and protect appellant against unfair competition. The lower Court was of the view, emphasized by that Court during the trial (Tr. 317), that even if an injunction were granted, the decree should not require

that the distinguishing features to be used by appellee, such as his given name, must be displayed with equal prominence as the name "Lerner". In fact, after commenting that any use by appellee of his given name, regardless of the manner in which he subordinated it to his surname, would meet the requirements of the law, the trial Court showed some impatience with appellant's contrary view and stated (p. 317):

"Of course, that might not satisfy the particular requirements or some standard that the plaintiff wanted, but looking at it as an impartial third person it would seem to me to be sufficient, and that is why I could not understand why you had to go and litigate this matter."

Here again, the view of the trial Court was erroneous. Under the authorities, even if appellee acted without any intent to trade upon the good will of appellant, nevertheless, the least relief to which appellant is entitled is an injunction against any use of the name "Lerner" by appellee which is not accompanied by other distinguishing features such as his given name displayed with equal prominence.

A review of the authorities which have given consideration to the question of the relief to which plaintiff is entitled against a defendant with the same surname, when such defendant, even though acting in good faith, has caused confusion between his business and a previously established business, discloses that it is uniformly required that such a defendant use his full name rather than his surname alone, and that he give equal prominence to each portion of such name.

In *Kaufman v. Kaufman*, 123 N. Y. S. 699, the plaintiff, Benjamin H. Kaufman, conducted seventeen hat stores under the name of "Kaufman hats". The defendant, Samuel Kaufman, opened a store identified by a sign reading "Kaufman hats". There were other factors present in the case which, added to the use of the name, furnished the basis for the issuance of an injunction. With respect to the point here under consideration—the type of relief to be granted to the plaintiff—the Court held that defendant should be enjoined from using the name "Kaufman" on the front of his store and in his general advertising,

"unless, in connection with it he uses his first name on a line with it and *in letters of equal size.*" (Italics added.)

In one of the most recent cases on the subject, *Horlick's Malted Milk Corporation v. Charles Horlick*, 7 Cir., 143 Fed. (2d) 32, the plaintiff, the well-known distributor of Horlick's Malted Milk, sued to enjoin the defendant, Charles Horlick, from distributing a dog food under the name of Horlick Dog Food. The District Court found that defendant had been free from fraud or misrepresentation and that there was no actual confusion in the minds of the public between plaintiff's product and that of the defendant. However, the District Court granted an injunction in favor of the plaintiff which provided that the defendant should be restrained from:

“(a) Using the name ‘Horlick’ on his packages or in any manner in connection with the manufacture and sale of dog food without using in association therewith some other word or words which shall distinguish his product from plain-

tiff's product, *which word or words shall be printed in type of (at) least one-half the size of the type used in printing the name 'Horlick.'*

“(b) Using the phrase ‘Manufactured by Horlick of Horlicksville, Racine, Wisconsin,’ without using in connection therewith the initials, word or words as set forth in (a) above.” (Italics added.)

Feeling that the District Court did not grant it the full relief to which it was entitled the plaintiff appealed from that portion of the decree which permitted defendant (1) to use the name “Horlick” as a designation for his product and (2) to use in connection with the name “Horlick” an indication of the manufacturer by means of words displayed in type *only half the size of the name “Horlick”*.

On appeal the Circuit Court of Appeals modified the judgment of the District Court and while refusing to enjoin the defendant from the use of his name altogether—the parties selling different products—broadened the relief in favor of the plaintiff, stating and ruling as follows (p. 36):

“The obligation resting upon defendant in using his name is not to insure that every purchaser will know that he is the maker, but to use every reasonable means to prevent confusion. Kellogg Company v. National Biscuit Co., 305 U. S. 111, 121, 59 S. Ct. 109, 83 L. Ed. 73. Because of all the dissimilarities noted above, and because the decree requires defendant to distinguish his product from plaintiff's product, we are not persuaded that plaintiff should have the extremely broad decree it seeks.

“We conclude that defendant may use his name as a designation for his product. But in order to carry out the District Court’s suggestion (50 F. Supp. 417, 419) that *‘If the defendant exercised the reasonable care required, he would have used his own name and address, such as “Manufactured by Charles Horlick, Horlicksville, Racine, R.F.D., Wisconsin”,’* and further to eliminate the possibility that purchasers will think defendant’s product is made by plaintiff, *the decree will be modified by enjoining the defendant from using the name ‘Horlick’ on his packages and labels except in combination with his first name, ‘Charles’, in type equally large and conspicuous, and from using the phrase ‘Manufactured by Horlick of Horlicksville, Racine, Wisconsin.’* He shall substitute in lieu of the last phrase the words, ‘Manufactured by Charles Horlick, Horlicksville, Racine, Wisconsin’. The words, ‘Manufactured by Charles Horlick, Horlicksville, Racine, Wisconsin,’ will appear in letters one-half the size of the printing used in the phrase ‘Charles Horlick’ on the face of the package.

“When the modifications herein suggested are carried out, there will be no poaching on the commercial magnetism of plaintiff’s trade-mark, *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U. S. 203, 205, 62 S. Ct. 1022, 86 L. Ed. 1381, and defendant’s use of his name will be wholly honest, and hence permissible. See Annotation in 47 A.L.R. 1190.

“The decree of the District Court will be modified in accordance with this opinion, and as modified it is affirmed.” (*Italics added.*)

In *Gottdiener v. Joe’s Restaurant* (Fla.), 149 So. 646, the plaintiff had for 10 years conducted a res-

taurant at Miami Beach, Florida, under the names: "Joe's Restaurant" and "Joe's." Plaintiff's restaurant had acquired a reputation for excellence in cuisine and service. Defendant opened a restaurant in Miami Beach under the trade names of "Little Joe's Restaurant" or "Little Joe". Among other things which furnished the basis for an injunction, defendant erected an electric sign over his place of business which when illuminated brought out in bold relief the word "Joe's"—the word "Little" in much smaller letters being illegible at a comparatively short distance. The trial Court ordered that defendant be enjoined altogether from the use of the name "Little Joe" or "Little Joe's Restaurant". Defendant appealed. A majority of the Supreme Court of Florida held that the judgment should be modified, but all of the members of the Court agreed in the requirement that the word "Little" which served to distinguish defendant's restaurant from that of plaintiff should be equally conspicuous at all times with the remainder of defendant's name. The Court stated (p. 647):

"The writer is of the opinion that the decree of the court below, in view of all circumstances shown in the pleadings and evidence, might well be affirmed as written, but the majority of the court are of the opinion that the terms of the injunction granted are too broad. The majority holding is that the injunction of the defendant in the court below should have been so framed as to enjoin the defendant from using or maintaining in connection with his business any signs, placards, or other means of advertisement in which the word 'Little' preceding the words 'Joe's Restaurant' was printed or framed in such small type of characters as to tend to confuse the

identifying of his restaurant business with that of 'Joe's Restaurant'; that is, *that such signs, placards, and means of advertisements used or to be used by the defendant should be so prepared as to make the word 'Little' in designating the business of 'Little Joe's Restaurant' equally conspicuous with the succeeding words 'Joe's Restaurant'*, so as to prevent any confusion in the minds of the public between the businesses respectively of the appellant and the appellee.

"It follows that the decree as granted is erroneous and must be reversed, with directions for reforming the decree so as to conform with the holding hereinabove outlined."

In *Foss v. Culbertson* (Wash.), 136 Pac. (2d) 711, it was held that the defendant was in unfair competition with the plaintiff in including in defendant's trade name the word "University" in connection with the operation of a transfer and storage business. The judgment of the trial Court, however, permitted the defendant to use the name "University" in connection with certain phases of defendant's business and made no restriction as to the manner in which said name should be used. The plaintiff appealed to the Supreme Court of Washington from that portion of the judgment. The Supreme Court of Washington modified the judgment of the trial Court as follows (p. 720):

"We are therefore of the opinion that the trial court should, in addition to the injunctive relief granted to plaintiff, also have enjoined defendant from using the word University in connection with the words storage and warehouse, in the manner in which they have been used, at least so long as defendant operates a moving and

transfer business as well as a storage and warehouse business.

“However, we do not feel justified in enjoining defendant from using the word University in connection with its full corporate name, and we are therefore of the opinion that defendant is entitled to use the word University on its vans and trucks, on its warehouse and in its advertisements, in connection with its full corporate name, *no more prominence to be given to the word University than to the other words in the name.*”

In *L. E. Waterman Co. v. Modern Pen Co.*, 235 U. S. 88, 35 S. Ct. 91, 59 L. Ed. 142, it was held that the defendant was under a duty to use means of avoiding confusion between its product and that of the plaintiff, and the form of the decree granted was that the defendant was required to refrain,—from the use of the name “A. A. Waterman”, to identify its product under the name “Arthur A. Waterman & Company”, and to use an explanatory phrase, “Not connected with the L. E. Waterman Company”, *with the additional requirement that the explanatory phrase “be juxtaposed in equally large and conspicuous letters when the permitted name was marked upon any part of the fountain pen sold by the defendant, or upon boxes containing such pens, and whenever the name was used by way of advertisement or otherwise to denote any fountain pens made or sold by the defendant.”*

In *Warshawsky & Co. v. A. Warshawsky & Co.*, 257 Ill. App. 571, the plaintiff had established a valuable good will in the business of selling second-hand automobile parts and accessories under the name of “Warshawsky’s”. Defendant went into competition

under the name "A. Warshawsky & Co." Upon defendant's place of business and in his publicity the letter "A" was always made less conspicuous than the surname "Warshawsky". There were other factors discussed by the Court in reaching the conclusion that an injunction should be issued, but in connection with the form of the decree, it was held by both the trial and Appellate Courts that in the use of his surname defendant should be enjoined from using it,—

"unless there is added to said name *in letters of the same size, type, script or writing by which said name is displayed*, the words 'not connected with Warshawsky & Co., a corporation'".

In *Stark v. Stark Bros. Nursery and Orchards Company*, 8 Cir., 257 Fed. 9, the Circuit Court of Appeals, upon appeal, granted the plaintiff the additional relief of requiring the defendants, who were adjudged to have been guilty of unfair competition, to attach a notice to all of their circulars, catalogues and advertisements and required that such notice must be,—

"in form *as conspicuous as the body* of such circulars, catalogues or advertisements".

In *R. B. Davis Co. v. Davis*, 2 Cir., 75 F. (2d) 499, the defendant commenced distribution of baking powder in competition with plaintiff's well established product under a label which featured the defendant's name of "Davis". The Circuit Court of Appeals affirmed, with modification, an order granting a temporary injunction against defendant, stating (p. 500):

"Laying aside all controverted issues, it is apparent that the defendant, long before his busi-

ness could have become substantial, learned that the use of his name in baking powder business would be likely to interfere with the plaintiff's old and well-known name. Thereafter he went on at his peril, even though his original purpose was innocent; a conclusion which we are by no means disposed to assume, and whose determination we leave open for the hearing. * * *

In ordering a modified form of preliminary injunction the Circuit Court of Appeals held that the injunction should provide that defendant be restrained,—

“‘From using in connection with the sale of baking powder other than the plaintiff's product, the word, “Davis”, unless accompanied by the prefix, “Julius J.”, and the suffix, “not connected with the R. B. Davis Company, manufacturers of the original Davis baking powder.” *Both prefix and suffix are to be in type of the same font, size and color as the word “Davis.”*’”

The foregoing authorities show that the proper relief to be granted to plaintiff, even if appellee be considered an innocent infringer, must include the requirement that he use his full name and give each word equal prominence at all times. Unless at least that much is done, the attempt to remove and avoid confusion may prove ineffective.

Appellant's right to an injunction was not affected by appellee's use after suit was commenced of the name “Wilfred” in some instances and in subordination to his surname.

Finally, it was also suggested during the trial (Tr. 317) that denial of any relief to appellant was warranted by reason of appellee having made some changes in the designation of his store after the suit

was commenced. No finding was made upon this point but a brief consideration of such suggestion will serve to show that the point is without merit.

The evidence showing the changes made by appellee after this suit was begun has been set forth in detail hereinabove. It showed that in using his given name appellee subordinated it to the name "Lerner". At the same time he continued to use the designation "Lerner" on the front of the entrance between the two show-windows of his store. (Plaintiff's Exhibit No. 17, Tr. 245.) Moreover, appellee maintained throughout the trial that he was under no legal obligation to use his given name or any other distinguishing feature.

The record, therefore, rather than showing that appellee's conduct subsequent to the commencement of suit has removed the threat of future unfair competition, shows quite clearly that appellee is determined to refrain from clearly differentiating his store from appellant's stores.

An identical situation was presented in the case of *R. H. Macy & Co., Inc. v. Colorado Clothing Mfg. Co.*, 10 Cir., 68 F. (2d) 690. In that case, as in the case at bar, the defendant used distinguishing features subsequent to the commencement of the litigation, but failed to give them equal prominence with the name "Macy". In reversing the judgment of the trial Court and directing that an injunction should have been issued, the Circuit Court of Appeals stated (p. 692):

"Distinguishing features, which are not so placed or used as to be sufficiently prominent to prevent deception, or which are not likely to attract atten-

tion, are insufficient. An artifice, such as the use of small print to make inconspicuous the alleged distinguishing features, shows a purpose to effect unfair competition. It is the usual artifice of the unfair trader. *Collinsplatt v. Finlayson* (C. C. N. Y.) 88 F. 693; *Kyle v. Perfection Mattress Co.*, 127 Ala. 39, 28 So. 545, 50 L.R.A. 628, 85 Am. St. Rep. 78."

See also:

Bradford Baking Co. v. Weber Baking Co., 43 Cal. App. 570, 574;

Pinaud, Inc. v. Huebschman, 27 F. (2d) 531, 538;

Plant Co. v. May Mercantile Co., 153 F. 229, 231;

Sears Roebuck & Co. v. Fed. Trade Comm., 7 Cir., 258 F. 307, 310.

CONCLUSION.

Appellant has set forth the evidence in detail and has quoted from the authorities at considerable length, because problems of unfair competition in trade, to a greater extent than most other problems, depend for correct analysis upon careful consideration and appraisal of the detailed items of evidence and surrounding circumstances. The record at bar contains the necessary evidence, but it was not reflected in the findings, and it was incumbent upon appellant, therefore, to point out the relevant facts and to establish their materiality under the authorities.

Appellant submits that it has been shown hereinabove by references to both the evidence and the au-

thorities that the record permits of no other conclusion than that appellant fully established the facts necessary to require that an injunction be issued. It appears:

(1) That appellant is known by its customers and the public as "Lerner's", the very same designation chosen by appellee;

(2) That appellant has adopted and pursued a policy of expansion;

(3) That San Jose is within appellant's normal area of expansion and that appellant actually expanded into that city by taking a lease therein in 1941, long prior to the time that appellee opened his store;

(4) That appellant actually has customers in San Jose and nearby communities;

(5) That some of appellant's customers have been confused by appellee's designation into believing that appellant had opened one of its stores in San Jose.

Those facts entitle appellant to relief, and to that end the judgment should be reversed and the trial court directed to find the material facts in accordance with the evidence as hereinbefore detailed, and upon the basis thereof to issue an injunction in favor of appellant.

Dated, San Francisco, California,

October 2, 1946.

Respectfully submitted,

JESSE H. STEINHART,

By S. A. LADAR,

Attorney for Appellant.

No. 11,347

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LERNER STORES CORPORATION (a corporation),

Appellant,

vs.

WILFRED A. LERNER,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I. APPELLANT'S SPECIFICATION OF ERRORS PRESENTS NO REVIEWABLE QUESTION.

It is apparent from appellant's specification of errors that this appeal is in fact an attempt to re-argue the entire case in the expectation of inducing this Court to come to a different conclusion, upon the entire record. This is revealed by the indefinite and generalized nature of the specification of errors, and by the comments of appellant upon those specifications.

Under the heading "Specification of Errors" appellant states:

"Appellant's position is that:

(1) The trial Court erred in refusing to make any finding on certain material points as to which the evidence was uncontradicted;

(2) Many of the findings made by the trial Court are not supported by the evidence;

(3) Under the uncontradicted evidence the Court erred in refusing to grant any relief to appellant in connection with the use by appellee of the name 'Lerner'." (App. Br., pp. 2-3.)

(a) Appellant's specification (1).

The first specification, that "the trial court erred in refusing to make any finding on certain material points as to which the evidence was uncontradicted", fails to point out what the so-called "material points" are, so that it may be ascertained by an examination of the findings whether findings were in fact not made upon such "points", and if not, whether they are "material".

Similarly, the specification fails to indicate the "uncontradicted evidence" relied upon to support the "material points", so that it may be ascertained whether there was such evidence, and whether it was, in fact, uncontradicted.

(b) Appellant's specification (2).

The second specification, that "many of the findings made by the trial court are not supported by the evidence", is a mere generality. There is no indication as to which of the "many" findings are not supported by the evidence, or how many such findings there are, so that it may be ascertained whether the other findings which *are* supported by the evidence, and to which no objection is taken, are sufficient to sustain the judgment; and if not, whether the findings

which it is asserted are not supported by the evidence are not, in actual fact, supported by the evidence. Obviously, in the absence of identification of the particular findings, or portions of findings, which are asserted to be unsupported, it is impossible to divine what particular questions are presented for review. The objection here made does not preclude the possibility that there are material findings sufficient to support the judgment to which no objection is taken upon the ground of insufficiency of the evidence. Hence, even if the objection be true, it presents no ground for reversal.

(c) Appellant's specification (3).

The third specification merely states, in effect, that the entire evidence in the case was uncontradicted and that appellant was entitled to judgment, as a matter of law, upon such evidence. There is no attempt to state, in even the most general terms, the evidence relied upon, or even the subject matter thereof, or the principle involved, so that it may be ascertained whether the evidence is in fact uncontradicted, and if so, whether it supports the conclusion that appellant was entitled to judgment, as a matter of law.

The most that can be said for the foregoing objections is that they merely raise the question whether the findings of fact support the judgment. The rule has been frequently applied and is beyond dispute.

“The assignment of errors alleges error because the court found certain facts, because of certain declarations of law, and in failing to render a judgment for the plaintiff. These assign-

ments present no reviewable question, except the question whether the judgment is supported by the findings which were made.”

Dreyer Commission Co. v. Hellmich (CCA 8th)
25 F(2) 408, 410.

“Assignment 3 is: ‘That the evidence was, and is insufficient to justify or support the verdict of the jury and/or the judgment.’ This is not a proper or sufficient assignment of error, nor is it separately or specifically urged in appellant’s brief and therefore should not be considered.”

Mutual Life Ins. Co. v. Wells Fargo Bank & Union Trust Co. (CCA 9th) 86 F(2) 585, 587.

“Assignment No. 22 is ‘that the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact.’ This assignment is not only too general, but it embraces three different assignments of error contrary to our rule 11. The alleged errors embraced in this assignment are as follows: First, ‘that the judgment is contrary to law. * * *’ This cannot be considered because too general. *Washburn v. Douthit* (C.C.A.) 73 F. (2d) 23. Second, ‘that it is not justified by any evidence * * *.’ This assignment is also too general and is not based upon any ruling of the court pointed out in the specification. *Hecht v. Alfaro* (C.C.A.) 10 F. (2d) 464. Third, ‘nor is it supported by findings of fact.’ This latter assignment, if entirely separate from the other two, would be a proper assignment to challenge the sufficiency of the findings of fact to support the judgment. Assignment 22 need not

be considered because it violates the rule requiring assignments of error to 'set out separately and particularly each error asserted and intended to be urged.' "

Century Indemnity Co. v. Nelson (CCA 8th)
90 F.(2) 644, 647.

"The three remaining specifications of error assert that 'The evidence is insufficient to justify any verdict herein'; that 'The verdict is contra to [sic] the instructions of the court and against the law'; and that 'The court erred in permitting the judgment in favor of the plaintiff and against the defendant'."

"In the light of the record, which we have already discussed, these assignments are entirely too general to bring up any question for review of this court."

Humphreys Gold Corporation v. Lewis (CCA 9th) 90 F.(2) 896, 898-9.

See:

- 11 Cyc. of Fed. Proc. (2d Ed.) pp. 715, 723-728;
- 12 Cyc. of Fed. Proc. (2d Ed.) pp. 14-19;
- 4 C. J. S. pp. 1717, 1784, 1883.

The indefiniteness of appellant's specification of errors is not the result of inadvertence or lack of skill. It is intentional, as indicated by the following remarks, immediately following the specification of errors:

"In presenting this appeal appellant has in mind the governing rule that the trial Court's appraisal of the evidence will not be set aside unless

it is clearly erroneous. This appeal is predicated upon the proposition that *a review of the evidence in detail* and consideration of the record *as an entirety* leads to the conclusion that material portions of the findings of the trial Court are not supported by evidence, [and] that the lower Court failed to give proper legal effect to the facts set forth in the record.” (App. Br., p. 3.) (Italics added.)

Appellant neglects to explain how “a review of the evidence in detail and consideration of the record as an entirety” can reveal that “material portions of the findings * * * are not supported by the evidence”, in the absence of specific identification of the findings which are said to be material, and unsupported.

Similarly, appellant does not disclose how “a review of the evidence in detail” will show in what respects the Court “failed to give proper legal effect to the facts set forth in the record” in the absence of specification of the particular facts to which the Court failed to give the desired “legal effect”, and a statement of the “legal effect” which appellant would have substituted for the conclusions reached by the trial court. Appellant does not even explain what is meant by the phrase “legal effect” as used here. Does it mean that the court made improper legal conclusions from the facts found? Does it mean that the findings are contrary to the evidence? Unsupported by any evidence? Against the weight of the evidence? Or just merely contrary to *appellant’s view* of the evidence?

Obviously, appellant is attempting to object because the trial court's view of the evidence was not the same as appellant's. This is further borne out by appellant's remarks at the conclusion of the "Statement of the Evidence" (which statement is not conceded to be correct) as follows:

"Evidently it was the view of the trial Court, as evidenced by statements from the bench (Tr. 294-297), that while appellant had built up a valuable and expanding business and a substantial good will, it had no store actually located in San Jose, and there was no likelihood of confusion or unfair competition as between appellee's store in San Jose and appellant's stores in San Francisco and Oakland. The Court directed that findings and judgment should be prepared denying appellant any relief." (App. Br., p. 19.)

This is precisely the principle issue before the trial court. On its face it reveals that appellant is well aware that the court was passing on questions of fact which are peculiarly within the province of the trial court, namely, whether, under the evidence, there was likelihood of confusion, or unfair competition, between appellant's stores in San Francisco and Oakland, and appellee's store in San Jose, where appellant had no store. At the hearing upon the settlement of the findings, appellant's counsel admitted that the basic question whether there was competition between the appellant's business in San Francisco and appellee's business in Oakland was for the trier of fact. Counsel stated.

“* * * a certain amount of business or a certain number of customers per month came from these various areas. There is not any dispute about that. *Whether it is sufficiently material to move the court is another question.*” (Tr. pp. 300-301.)

Naturally, if there was a conflict of evidence upon any material issue necessary to support appellant's case, the findings of the trial court on that issue against appellant are fatal to this appeal. Similarly, on questions as to which the testimony is uncontradicted, but from which different inferences may be drawn, or to which the trial court is authorized to give varying weight, a finding against appellant on a material issue is fatal to this appeal.

But, as already pointed out appellant has not favored this court or appellee with a specification of the findings which are objected to, upon one ground or another. It is respectfully submitted that, upon the authorities cited the judgment should be affirmed, without proceeding beyond this point.

“A violation of our rule * * * justifies the court in refusing to consider the specifications which violate the rule.”

Century Indemnity Co. v. Nelson (CCA 9th) 90 F(2) 644, 648.

“Appellee challenges the assignment of errors as insufficient for the matters appellant seeks to present here. Obviously, this question must be resolved before we proceed further, since we must determine which, if any, of the matters urged by appellant are not properly before us.

* * * * *

Appellant designates assignments 7, 8, and 9 as presenting her contention that the evidence failed to sustain plaintiff's allegations of fraud and that the misrepresented facts contributed to the death of insured. Assignment 7 is: 'Under the greater weight of all the credible evidence in the case there should have been a finding and decree in favor of the defendant' Assignment 8 is: 'The decree is against the law and against the law under all the evidence.' Assignment 9 is: 'The Court erred in its special findings of fact numbered one to eight, inclusive, as filed March 28, 1934.' These assignments are each too general to present a defined issue of law here. As to assignment 7: There were two separate and distinct matters presented by the pleadings (fraudulent representations in the application and ill health at delivery of the policy), either of which, if true, would justify rescission of the policy. The trial court found both true. Even if the fraudulent representations in the application were unsupported by the evidence, yet the ill health at delivery of the policy would remain and be sufficient to sustain the decree. Assignment 8 is obviously too general. Assignment 9 is a blanket attack upon all of the findings of fact which included various distinct matters—some of which are attacked here and some not.

Appellant relies upon assignments 3 and 11 to support her presentation of the issue that the appellee is not entitled to equitable relief because it tendered rescission during the contestable period and therefore has an adequate remedy at law. Assignment 3 is: 'The Court erred in its conclusions of law filed and entered March 28,

1934.' Assignment 11 is: 'The Court erred in decreeing a cancellation and rescission of the policy in issue.' Clearly, each of these assignments is too general.

Conclusion

Since none of the assignments of errors here relied on is particular enough to present any matter which we may examine, we are precluded from discussing the merits of the various propositions urged by appellant. It is an easy matter for parties to clearly and particularly state, in the assignment of errors, the precise issue of law they seek to present here. Our rules require that the assignment 'shall set out separately and particularly each error asserted and intended to be urged.' Clearly, no one of the above assignments, complies with this simple and easily followed requirement."

Rohrback v. Mutual Life Ins. Co. of New York
(CCA 8th) 82 F(2) 291, 292-3.

"Assignment 3 is: 'That the evidence was and is insufficient to justify or support the verdict of the jury and/or the judgment.' This is not a proper or sufficient assignment of error, nor is it separately or specifically urged in appellant's brief and therefore should not be considered."

Mutual Life Ins. Co. v. Wells Fargo Bank
(CCA 9th) 86 F(2) 585, 587.

However, without intending to waive the objection to the inadequate specification of errors, appellee will proceed and point out that the findings support the judgment, and that the points discussed in appellant's argument are without merit.

II. APPELLANT'S STATEMENT OF THE EVIDENCE IS NOT CORRECT.

Before giving attention to appellant's argument, appellee takes issue with appellant's "Statement of the Evidence", and particularly to the statement at the outset thereof that "the record show the following uncontradicted *facts*". (App. Br., p. 3) (*Italics added.*) The statement of evidence is replete with appellant's own conclusions and inferences, and are neither facts nor evidence. For example, it is stated that it is an uncontradicted fact, that

"It has been the policy and practice of appellant to continually expand its organization and open new stores.

* * * * *

The practice is for new stores to be opened first in populous cities, followed by stores in surrounding communities after a nucleus of business from the surrounding communities has been built up." (App. Br., p. 7.)

It is true that there was some testimony to this effect offered by appellant, but it did not stand up under cross-examination and it was not supported by the evidence of the actual practice pursued by appellant.

This so-called "practice" is discussed in various places in appellant's argument, and appellee will point out the inaccuracies in the above statement in the portion of this brief dealing with that subject.

Similarly, other inaccuracies in the "Statement of the Evidence" will be pointed out in responding to

appellant's arguments wherein the particular evidence is discussed. To do so here would merely entail repetition.

III. THE FINDINGS SUPPORT THE JUDGMENT.

The findings in the case at bar are in the usual form found in cases of this kind and were adapted from forms which have received judicial approval.

In the case at bar, the trial court made findings, in considerable detail, that appellant had twelve stores in California, of which only the stores in Oakland and Stockton, and the two stores in San Francisco, were in Northern California. (Finding II, Tr. p. 31); that appellant's stores were located in "100% locations" [see Tr. p. 118 for definition] and relied in substantial part upon passing pedestrian traffic for their customers; that appellant's stores did not advertise in newspapers, periodicals, or in any other manner than in the use of the name on the store fronts, and on wrapping paper, bags and price tags, that is to say, only upon or in the stores; that the customers of appellant's stores consisted in substantial part of passing pedestrians, who in turn consisted principally of people from within the city and the immediate environs where the respective stores were located, but including persons from throughout the United States and other places,—or as appellant states, appellant's stores in the various cities are patronized "where such persons happen to be" (App. Br., p. 23, Finding III, Tr. pp. 31-32); that appellee opened his

store in San Jose in good faith and without knowledge that appellant had any intention of opening a store there, that he took reasonable precautions to prevent confusion between his business and the stores of appellant; that no confusion has resulted, and that there has been no detriment or damage to appellant by reason of any act or conduct of appellee; (Findings IV and V, Tr. p. 31-32) that appellee's store, signs and advertising are of such character, appearance, and form that no reasonably observant or careful person would be confused or do business with appellee under the misapprehension that he was doing business with appellant; that appellee had not done any act, or made any statement, or resorted to any artifice that would mislead or confuse customers, and that none were confused or misled, and that appellee had performed no unfair act, or made any unfair statement, or resorted to any unfair practice detrimental to appellant. (Finding VI, Tr. pp. 33-34.)

The foregoing findings are directly responsive to, and the negation of, the allegations of the complaint to the contrary effect. (See par. 7-15, of the complaint, Tr. pp. 6-11.) The complaint alleged, in substance, that appellee, with fraudulent intent, opened a store in San Jose and conducted his business in such manner as to confuse and deceive the public, to the detriment and damage of appellant. The foregoing findings completely dispose of the issue thus tendered by the allegations of the complaint and the denial thereof in the answer. (Tr. pp. 18-27.) If the findings were to the opposite effect, in favor of

appellant, they would support a judgment in favor of appellant, and conversely they amply support a judgment in favor of appellee.

The foregoing findings were adopted from the findings in a similar case, which were there held to be sufficient.

The Ida May Co., Inc. v. Ida May Ensign,
20 Cal. App. (2d) 339, 341-3.

See, also,

Pohl v. Anderson, 13 Cal. App. (2d) 241, 242.

But the findings do not stop with finding, in effect, that the allegations of fraudulent intent, confusion, deception and damage are untrue, although such findings, and no others, would have sufficed. The answer expressly pleaded that

- “Plaintiff has not advertised and has not engaged in business in a locality where defendant’s store is located * * *.” (Tr. p. 24.)

and that defendant was

“using his own name in the operation of his business and is so using it in a geographical location in which plaintiff has no store and has no substantial business * * *.” (Tr. p. 27.)

In response to the foregoing defense, the court made finding VII, as follows:

“Said ‘Lerner Shops’ have not been advertised in and about the City of San Jose, and neither plaintiff nor any of its subsidiaries have engaged in the retail ladies ready-to-wear business in San Jose under the name of ‘Lerner Shops’ or under

any other name, or under any name including the word 'Lerner'. Defendant was first in the field in and about the City of San Jose in the retail ladies ready-to-wear business under a name including the word 'Lerner'. The business of defendant is in a separate and distinct geographical and trading area and in a separate business community from any of said 'Lerner Shops.' Neither plaintiff nor any of its subsidiaries, nor any of the 'Lerner Shops' has or had entered into the retail ladies ready-to-wear field in and about the City of San Jose prior to the time when defendant commenced to do business therein, as aforesaid. Defendant has not done and is not doing business in any field, territory, area or market previously entered or occupied by 'Lerner Shops', or any of them, or by plaintiff or any of its subsidiaries, or in which any of said 'Lerner Shops' or plaintiff or any of its subsidiaries were doing business prior to the time when defendant commenced to do business as aforesaid. The business conducted by defendant in San Jose is not in competition with the business of said 'Lerner Shops' or any of them, or with the business of plaintiff or any of its subsidiaries." (Tr. pp. 35-36.)

This latter finding in the instant case is based upon and adapted from the findings in *Griesedieck Western Brewery Co. v. Peoples Brewing Co.* (CCA 8th) 149 F(2) 1019, 1021-22. Although that case involved a trade mark used in the marketing of beer, the question involved was the rights of the plaintiff to enjoin the defendant from using the name "Stag" in the marketing of beer in a territory in which the court found,

from the evidence, the plaintiff had not previously sold its product. In approving the findings, the court said:

“The findings of the court are presumptively correct and should not be set aside nor disturbed unless clearly erroneous. Rule 52, Rules of Civil Procedure, 28 U.S.C.A. following section 723c; *Esso, Inc., v. Standard Oil Co.*, 8 Cir., 98 F. 2d 1. A study of the record discloses that there was little or no conflict in the evidence. So far as these findings reflect primary facts as distinguished from interferences or conclusions, we think they are sustained by abundant evidence.”

Griesedieck Western Brewery Co. v. Peoples Brewing Co., *Supra*, at p. 1022.

Among the findings thus approved were the following:

“(6) that plaintiff and defendant are not now and never have been in competition with each other and that plaintiff has never advertised nor sold any of its ‘Stag’ beer in any market where defendant has advertised or sold its ‘Stag’ beer, or any market adjacent thereto; (7) that the market in which plaintiff has advertised and sold its ‘Stag’ beer and the market in which defendant has advertised and sold its ‘Stag’ beer are wholly remote the one from the other, and plaintiff has no property rights in the trade-name of ‘Stag’ beer, or in markets adjacent thereto, and defendant has no property rights in the trade-mark ‘Stag’ in markets wherein plaintiff has advertised and sold its ‘Stag’ beer, or in markets adjacent thereto; * * * (9) that the use of the trade-

mark 'Stag' or stag's head design, or any 'Stag' label by plaintiff, or the use of the trade-mark 'Stag' or stag's head design, or any 'Stag' label by defendant, has at no time caused any confusion in the trade or misled or caused any purchaser or induced anyone to buy any of the 'Stag' beer product of either of the parties as the product of the other." (Supra, at pp. 1021-2.)

As already pointed out, the case last cited involved the name of a product, while in the case at bar, there is involved only the question of the name used in connection with a place of business. In the very nature of things, the area of protection afforded to a trade-marked product will be wider than that given to the name of a business. The name of the product goes wherever the product is sold, by mail order or otherwise, regardless of where the business establishment is located, and the one first doing business in the territory is protected against the later comer. Conversely, the later comer is protected if he is first in the territory to use the name in question. (*Griesedieck Western Brewery Co. v. Peoples Brewing Co.*, supra at pp. 1022-3; *Sweet Sixteen Co. v. Sweet "16" Shop, Inc.* (CCA 8th) 15 F(2d) 920, 923 quoted and discussed to the same effect at App. Br. pp. 45-49.) In a case involving the name of an establishment, as distinguished from the name of a product, the principle is identical, but the area of protection will naturally be more circumscribed.

For example, plaintiff, National Grocery Co. had 400 grocery stores in the northern counties of New

Jersey, the word "National" was stressed in plaintiff's advertising. Defendant had 40 stores in the southern counties of the state, and conducted these under the name National Stores Corporation, likewise giving prominence to the word "National". The distance separating the nearest stores of the parties was 25 to 30 miles. An injunction was denied plaintiff, the court saying:

"In all such cases, and in all of those cited by the complainant, there has been present the fraudulent element indicated by the language of Vice Chancellor Van Fleet which I have emphasized. In the case sub judice this necessary element to a case of unfair competition is not to be found. Obviously, by force of the definition of the kind of business in which the parties are engaged, each store must draw its trade from a very small surrounding territory, because customers obliged to pay cash and carry away their purchases will not patronize a store unless within their immediate neighborhood. The proofs show conclusively that not only has the defendant scrupulously remained out of the territory exploited by the complainant, but that the complainant's activities have been confined to the northern counties of the state, the defendant's to the southern or central part of the state, and that the most southerly of the former is separated by perhaps 25 or 30 miles from the most northerly of the latter. This being so, it can scarcely be said that any unfair competition exists. As tersely expressed in 37 Cyc. 760:

'Of course, there must be actual competition before there can be any unfair competition.'

For example, it was held that druggists and physicians conduct businesses, professions, or callings not in competition with each other so that an injunction would not lie for unfair competition. *Clark v. Freeman*, 11 Beav. 112. To the same effect is *Borworth v. Evening Post* (37 Ch. D. 449), where it was held that an evening paper did not compete with a morning publication, each using in its title the word 'Post'.

The complainant goes further in its demands than I think is justified when it argues that because under its charter it is authorized to do business in any part of the state under its corporate name it has thereby pre-empted all the markets that can be found within New Jersey against any company formed with one adjective in its name to be also found in that of the complainant. Such a rule would be subversive of the underlying principle governing monopolies, and would, of course, be highly detrimental to the public interest by reason of the stagnation of trade while the complainant was making up his mind or securing the capital necessary to expand into territory it might properly occupy and which it hopes and expects some day to invade. While I know of no decision of our own courts in a case on all fours with the present case, there are, however, many opinions in other jurisdictions that make it clear that *the right of a given name previously adopted in a business located in one locality does not invest the proprietor of that business with the right to enjoin the use of the same or a similar name by a junior enterprise in another locality where one does not encroach upon the other*. Such were the cases of *Eastern Outfit-*

ting Co. v. Manheim, 59 Wash. 428, 110 Pac. 23, 35 L. R. A. (N.S.) 251; Investor Pub. Co. v. Dobinson (C. C.) 83 Fed. 56; Olin v. Bate, 98 Ill. 53, 38 Am. Rep. 78; Miskell v. Prokop, 58 Neb. 628, 79 N. W. 552; Hygeia Dist. Water Co. v. Consol. Ice Co., 144 Fed. 139; Nebr. Loan & Tr. Co. v. Nine, 27 Neb. 507, 43 N. W. 348, 20 Am. St. Rep. 686; Levy v. Waitt, 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190; Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339; Bingham School v. Gray, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243. But the complainant says this rule is not applicable to the instant case, because, in the very nature of things, the prospect of a so-called chain store business is the constant expanding, reaching out, and establishing of new stores in neighborhoods not already tapped. Surely, in the great majority of business enterprises, and especially those like the complainant's, involving a business capable of expansion and the investment of large capital, there is implied the hope, intention, and design of constantly invading new territory for the purpose of securing an increasing volume of business. *For reasons already touched upon, it would be absurd to say that any such intention should permit the pre-empting of the use of the name at a place and time where such a supposed business enterprise had no customers or business, and therefore nothing to lose. It is entirely too remote and fanciful for the complainant to object to another using a name in a certain locality, not because he has already established his trade there, but because he may do so in the future. For it is equally probable he may not. It is significant that in all*

the cases cited by the complainant in its brief there was an actual competition between the parties, in accordance with that portion of Vice-Chancellor Van Fleet's opinion in *Van Horn v. Coogan*, which I have already quoted and emphasized. In none of these cases is there presented the distinguishing features of this case, to-wit, that the parties were so separated from each other territorially that by reason of the fact and the character of their activities it was impossible for one to injure the other." (*Italics added.*)

National Grocery Co. v. National Stores Corporation (N. J. Ch.) 123 Atl. 740, 742-3.

Similarly, where a taxicab company commenced business in Los Angeles, using a name and slogan almost identical with that used by plaintiff in the same business in San Diego, plaintiff was denied an injunction, upon the ground that they were not operating in the same territory.

Yellow Cab Co. of San Diego v. Sachs, 191 Cal. 238, 242-244.

See also:

Eastern Outfitting Co. v. Manheim (Wash.) 110 Pac. 23, 35 L. R. A. (N. S.) 251.

The situation in the case at bar, involving the use of defendant's family name, is even stronger than in the cases cited, involving fanciful names. One has the right to such advantages as he feels are inherent in the use of his family name, in the absence of fraud or deception, and a family name cannot be made the subject of exclusive appropriation, even where there

is actual competition. It is his name, and was from birth, and he cannot be deprived of the right to use it, in the absence of fraud. On the other hand, one using a fanciful name has a free range of choice, and may thus avoid using a similar fanciful name which has become the subject of exclusive appropriation by another.

“The right to do business under one’s own name is one of the sacred rights known to the law; and a family name is incapable of exclusive appropriation and cannot be thus monopolized * * *. Every man has the absolute right to use his own name in his own business even though he may interfere with and injure the business of another bearing the same name; provided he does not resort to any artifice or do any act calculated to mislead the public as to the identity of the establishments or to produce injury to the other beyond that which results from the similarity of names.”

Tomsky v. Clark, 73 Cal. App. 412, 418.

See:

Ida May Co., Inc. v. Ensign, supra, at p. 344,
Note: 47 A.L.R. 1190;

Alhambra Transfer etc. Co. v. Muse, 41 C. A.
(2d) 92, 96.

The use of the name of some of its officers as part of its corporate name gives appellant no special rights.

Ida May Co. Inc. v. Ensign, supra, at p. 344.

The foregoing findings embrace all the issues necessary to determine the cause, and, in fact, embrace all the material issues raised by the pleadings:

“* * * if findings are made upon issues which determine a cause, other issues become immaterial, and a failure to find thereon does not constitute prejudicial error.”

Peterson v. Murphy, 59 C. A. (2d) 528, 533.

It is therefore respectfully submitted that the findings amply support the judgment.

IV. REPLY TO APPELLANT'S ARGUMENT UNDER THE HEADING "THE FINDINGS FAIL TO REFLECT THE EVIDENCE ON MATERIAL POINTS AND ARE CLEARLY ERRONEOUS UPON OTHER MATTERS".

Under this catch-all heading (App. Br. p. 21) appellant, for the first time, gives some inkling as to the nature of its objections.

A. The first sub-heading is entitled:

“Appellant's stores are known and referred to as ‘Lerner's’.”

Under this heading it is stated that:

“* * * there is no reference whatsoever in the findings with respect to the very material issue and undisputed proof that the majority of appellant's patrons and prospective customers identify and designate appellant's stores as ‘Lerner's’. (App. Br. p. 22.)”

Presumably this is urged as a ground for reversal. But on this subject the court made the following finding:

“* * * neither plaintiff nor any of its subsidiaries have engaged in the retail ladies ready-to-

wear business in San Jose under the name of 'Lerner Shops' or under any other name including the word 'Lerner'. Defendant was first in the field in and about the City of San Jose in the retail ladies ready-to-wear business under a name including the word 'Lerner'."

Obviously, the foregoing finding disposes of any issue as to the name "Lerner" or any variant of the name, including "Lerner's". Under this finding it is immaterial that some customers in San Francisco, or elsewhere, *while doing business with or standing in front of a Lerner Shop*, referred to it as "Lerner's". This is all that the evidence showed. (Tr. pp. 190-194, 213, 225-228.) There was no evidence of any kind that "Lerner Shops" had in any manner, by advertising or otherwise, used the name in San Jose, as in the cases cited by appellant. On the contrary, there was evidence adduced by appellant which would justify the court in doubting the testimony that Lerner Shops were known as "Lerner's" even where the stores were located. (Tr. pp. 175-176.) But in any event, the court's finding that appellant never was in business in San Jose "under any name including the word 'Lerner' embraces every variation of the name, including 'Lerner's'." A specific finding such as is suggested by appellant would add nothing which is not already disposed of by the findings made.

Furthermore, the court made detailed findings that
 " * * * no person of ordinary intelligence, and no person exercising ordinary care and no ordinarily observant purchaser would confuse it (appellee's store) with said 'Lerner Shops', or do business

with defendant under the reasonable or foreseeable misapprehension that he was doing business with said 'Lerner Shops'. * * * The style of lettering used by defendant on his store front and other advertising to display the name of his business * * * were so distinctive and different in every material respect from the arrangement and lettering, and the text thereof, used to display the name 'Lerner Shops' that no person of ordinary understanding and intelligence and no person exercising ordinary understanding and intelligence, and no person exercising ordinary care and no ordinarily observant purchaser would confuse defendant's store with said 'Lerner Shops' or do business with defendant under the reasonable or foreseeable misapprehension that he was doing business with 'Lerner Shops' or purchasing the merchandise of 'Lerner Shops'." (Finding VI, Tr. pp. 33-35.)

Of course, the foregoing findings are of the ultimate conclusion reached by the court as a result of all the evidence on the question of confusion, including the circumstance that persons standing on the street in front of a Lerner Shop, or while shopping in the store referred to a Lerner Shop as "Lerner's". Be that as it may, the findings of the court are to the effect that under all the evidence a person of ordinary intelligence will know that he is *not* doing business with a Lerner Shop when he is doing business with appellee's store in San Jose. The court obviously concluded that under the evidence in the case, it did not follow that because some persons, under some circumstances, referred to a Lerner Shop as "Lerner's",

that the converse is true, namely, that every person who saw the name "Lerner" or "Lerner's", as used by appellee, would of necessity believe it to be a "Lerner Shop". For example, if some persons referred to William Smith, a six-foot man, as "Smith", it would not follow that those same persons, confronted by Mary Smith, a five-foot woman must come to the conclusion that because both individuals had the name Smith in common, that Mary Smith would be mistaken for a six-foot man, by a person of ordinary intelligence. Obviously, there are other circumstances to be taken into consideration in determining whether there is a likelihood of confusion. The mere fact that appellant's stores were in some circumstances known as "Lerner's" is not conclusive of the question, as a matter of fact, and certainly not as a matter of law. The findings made, are of necessity contrary to the effect which appellant seems to ascribe to the circumstance in question. Consequently, the absence of a specific finding is not prejudicial.

"* * * if the findings made necessarily negative the allegations * * * as to which specific findings are not made, the findings are sufficient."

Petersen v. Murphy, 59 Cal. App. (2d) 528, 533-4.

Furthermore, it has been shown that even if a specific finding had been made on the detail mentioned, that it would not necessarily be inconsistent with and have the effect of counteracting the findings which were made. Consequently, there is no prejudice.

Petersen v. Murphy, supra, at p. 532.

B. Under the heading "Appellant had established a valuable reputation" appellant complains that:

"* * * the findings, while adverting to the fact that appellant sells low or popular priced apparel, fail to reflect the evidence which established without dispute appellant's allegations that appellant has established a reputation for selling up-to-date, well styled apparel at prices below those of its competitors." (App. Br. pp. 22-23.)

It is to be assumed that this is also urged as a ground for reversal. It is difficult to see how appellant is prejudiced by the omission of such a specific finding, or how it could be aided by the inclusion thereof. Whatever the reputation of appellant, the court found that there was no fraud, confusion or unfair competition.

Furthermore, it was stipulated that appellant had a good reputation (Tr. pp. 216-217) and hence no specific finding is necessary on that point.

Boyd v. Liefer, 144 Cal. 336, 338.

In any event, the evidence did not go quite as far as appellant indicates. The testimony was merely that appellant undersold *some*, not *all*, of its competitors (Tr. pp. 65, 66, 201) and that there were some companies which undersold appellant. (Tr. p. 117.)

Nor did the allegations of the complaint to which appellant refers go as far as appellant suggests in this connection. The complaint merely alleges that appellant has established a reputation for selling such apparel "at very reasonable prices" (Tr. p. 3) and

for selling such "low priced" apparel. (Tr. p. 5.) In response to this allegation, and the testimony herein referred to, the court found that:

"The business of said 'Lerner Shops' consists of the sale at retail, of low or popular priced ladies ready-to-wear wearing apparel." (Tr. pp. 31-32.)

Since this finding is substantially the same as the corresponding allegations of the complaint, appellant's objection is pointless.

C. Under the title "Appellant's stores had an established trade with persons from San Jose and adjacent cities, and many regular customers", appellant objects that:

"* * * no finding was made with respect to appellant's claim and proof that prior to the time that appellant opened his store in San Jose * * * appellant's stores in San Francisco and Oakland had established a substantial nucleus of business with residents of San Jose and communities nearby. * * *" (App. Br. p. 23.)

This deals with the subject mentioned in appellant's title, but appellant continues the above quotation in an entirely new and irrelevant direction, saying:

"and, on the basis of such business and as a part of appellant's plan, policy and practice of expanding 'from the populous cities in which it had first established its stores, into the smaller communities nearby appellant had leased additional locations in which to open new stores.
* * *'"

Turning back for the moment to the first part of this compound objection, it is patent on the face of it, that it draws conclusions not warranted by the evidence nor within the scope of the complaint.

Appellant refers to its "claim" that its San Francisco and Oakland stores "had established a substantial nucleus of business with residents of San Jose and communities nearby". Presumably by "claim" is meant the allegations of the complaint. The only allegation on this subject is that

"Plaintiff's stores in San Francisco and Oakland include among their customers residents of the City of San Jose and other Santa Clara and San Mateo County communities". (Tr. p. 3.)

It will be noted that it is not alleged that the number of such customers is "substantial" or that appellant "had established a substantial nucleus of business" in that area. Doing business with people from another area is not the same as doing business in that area.

Finding III which is responsive to this allegation, reads:

"Said 'Lerner Shops' are without exception, situated in locations having the highest volume of pedestrian traffic, known as '100% locations', and rely in substantial part upon passing pedestrian traffic for their customers. The business of said 'Lerner Shops' consists of the sale at retail, of low or popular priced ladies ready-to-wear wearing apparel. Said 'Lerner Shops' do not advertise in newspapers, periodicals, or in any other manner than in the use of the name 'Lerner

Shops' on the store fronts of the several stores, and the use of such name on paper and bag containers and price tickets attached to merchandise displayed in the show windows of said stores. No variation or abbreviation of the name 'Lerner Shops' is used in such advertising. *The customers of said 'Lerner Shops' consist in substantial part of persons who comprise the pedestrian traffic passing the respective stores, consisting in each instance, principally of persons from within the city and its immediate environs where a 'Lerner Shop' is situated, but including some persons from other areas throughout the United States and other places.*" (Tr. pp. 31-32; italics added.)

The last sentence of the finding clearly embraces the allegations of the complaint above quoted. Consequently, appellant has no occasion to object upon the ground that this allegation of the complaint was neglected by the court.

Appellant objects that "this finding is misleading and contrary to the evidence in several respects". (App. Br. p. 23.) Appellant can not object that the finding is not in accordance with the evidence. While it is true that there was evidence that appellant's customers included residents of San Jose and vicinity, there was at the same time evidence that appellant's customers also included persons from everywhere in the United States and other places, exactly as set forth in the findings, thus:

"Q. Now, Mr. Magee, your San Francisco Stores [sic] does business with people from New York?

A. Yes, sir.

Q. It does business with people from South Dakota?

A. I assume so.

Q. And it does business with people from every geographic point I might mention inside and outside of the United States, and that at times you have taken care of people from Timbuktu?

A. That's right.

Q. That is why you are in 100 per cent locations, because those are the crossroads of the world?

A. They come from Canada and Cuba." (Tr. p. 139.)

It will be observed that while the complaint merely alleged that appellant had customers from San Jose and other Santa Clara and San Mateo County communities, the evidence was not limited to these areas, and the findings are strictly in accordance with the evidence, and embrace the matter alleged in the complaint. It is appellant who desires to have the finding in such form as to be "misleading and contrary to the evidence", by ignoring the wider scope of the evidence. In view of the character of appellant's objections to the findings, there is no doubt that if the findings were limited to the territory mentioned in the complaint, appellant would object that the findings were too limited because they ignored the evidence above quoted. As a matter of fact, appellant does also make precisely that objection. Appellant's next objection is that the finding:

"In the first place, overlooks the material evidence that appellant is patronized regularly by

persons who trade with its stores in the various cities of the country *where such persons happen to be.*" (App. Br. p. 23; italics added.)

Obviously, the finding does exactly what appellant just previously says that it does not do. It specifically sets forth that appellant's stores are patronized by persons in the various cities of the country "where such persons happen to be", to use appellant's own phraseology.

Appellant's next objection is that:

"* * * the evidence also showed that many of the customers of appellant's stores in San Francisco and Oakland patronize such stores repeatedly." (App. Br. pp. 23-24.)

No doubt the objection is meant to imply a specific finding should have been made to the effect that many of appellant's customers patronize the stores more than once, and in the absence of such a finding the judgment should be reversed. Unfortunately, appellant neglects to point out how such a finding would alter the judgment.

Continuing its objections to Finding III, appellant says:

"In the second place, this finding is incomplete and misleading in its reference, in a rather off-handed manner, to the fact that appellant's patrons do include some persons from places other than the cities where appellant's stores are located. The facts affirmatively establish, without dispute, that a substantial number of customers of appellant's stores in San Francisco and Oak-

land are from cities all up and down the San Francisco peninsula, including San Jose.” (App. Br. p. 24.)

As already pointed out, the finding that appellant’s patrons come from many places is directly taken from the testimony, hence it cannot be “incomplete or misleading”. But the assertion that “The facts affirmatively establish *without dispute* that a *substantial* number of customers of appellant’s stores in San Francisco and Oakland are from cities all up and down the San Francisco peninsula, including San Jose” is directly contrary to the fact. Mr. Magee, the vice president of appellant corporation (Tr. p. 62) testified, on cross-examination:

“Q. Do you maintain, Mr. Magee, that people come from San Jose to San Francisco for the express purpose of shopping at Lerner’s Shops?

A. I would say some customers do.

Q. You wouldn’t know how many or what percentage?

A. I wouldn’t know how many.” (Tr. p. 139.)

Certainly that testimony does not support appellant’s assertion. Again Mr. Magee testified, on cross-examination:

“Q. Do you consider Sacramento in the trade area of San Francisco?

A. I would say people in Sacramento trade in San Francisco.

Q. Your Market Street store does considerable business with people from Sacramento?

A. I wouldn’t say ‘considerable business’. They do *some* business.

Q. You would say they do considerable business in San Jose?

A. They do business.

Q. Would you say it was considerable?

A. *I wouldn't say.*" (Tr. p. 173.)

Likewise, this testimony is directly contrary to appellant's bold assertion. It should be pointed out here that appellant neglected to quote or refer to this portion of Mr. Magee's testimony in the statement of the evidence, but referred only to his equivocal testimony on direct examination (App. Br. p. 11) as follows:

"Q. At that time when you started those negotiations, did you determine whether or not you had a nucleus in San Jose?

A. Yes, we had been in business on Market Street in our large store since 1935, and we had built up a very substantial volume. The records that we would have there in the form of credit slips would indicate we had a great many customers in San Jose, and also other surrounding communities of San Francisco." (Tr. p. 79.)

It will be observed that Mr. Magee was merely giving his conclusion that appellant had a "great many" customers in San Jose, *and other surrounding communities of San Francisco*, and that he based that conclusion upon certain records which are referred to in appellant's statement of evidence, immediately following the reference to the foregoing testimony. (App. Br. p. 11.) It should be noted that Mr. Magee takes in "other surrounding communities of San Francisco" in his statement that "we had a great many customers". There is no clue as to what he meant by "a

great many" or how many of the customers came from communities north and east of San Francisco, and how many from communities south of San Francisco, or what communities he considered as "surrounding" San Francisco. This testimony does not support appellant's assertion that a "*substantial* number of customers * * * are from cities all up and down the peninsula, including San Jose." Mr. Magee's conclusion is naturally no better than the information upon which he based it. It was obviously for the trial court to determine whether the number of customers from "all up and down the peninsula" was "*substantial*" and even if the number in that extensive area was substantial, whether of that number, the number coming from in and around San Jose was "*substantial*". In any event, the circumstance that plaintiff did business with some people from San Jose, is not the same thing as doing business *in* San Jose. If that were not so, then the fact that appellant had a store in San Francisco would give it prior rights throughout the United States and in Timbaktu, Canada and Cuba, because, as Mr. Magee testified the San Francisco store does business with people from those places, as well as with people from San Jose. (Tr. p. 139.)

Be that as it may, the trial court was undoubtedly impressed by Mr. Magee's later testimony, on cross-examination, to the effect that the business done with people from San Jose was *not* "considerable." (Tr. p. 173.) The trial court also was warranted in reaching a conclusion, from the records introduced, at variance with that of appellant, and the equivocal and con-

tradicted conclusion of Mr. Magee. For example, these records showed that in an eight month period, appellant's Market Street store had thirteen exchange transactions with persons from San Jose; and that such transactions represent 6 to 7 per cent of total transactions. Converting these figures into an annual basis, it appears that in a period of one year, the Market Street store had 324 transactions with residents of San Jose (App. Br. p. 12) or 27 transactions per month, or a so-called "substantial nucleus of business with residents of San Jose" of about one (1) transaction per day. In this connection, Mr. Magee testified on cross-examination that he did not know how many of those customers came to San Francisco from San Jose for the express purpose of shopping at Lerner Shops. (Tr. p. 139.) The trial court properly concluded and stated, that a finding such as that insisted upon by appellant would be contrary to the evidence. (Tr. pp. 319, 337.)

The court also stated its position in this connection on motion for new trial:

"The Court. Let me say this to you, so that if you can clear up my mind you will have a chance to do so, but I felt from the evidence that there was not any substance whatsoever to that contention in the facts of the case. *It may be that the record shows there were some customers, but I felt in truth and in fact that was not a substantial matter.* The argument that good will attaches itself over all areas that might reasonably be the basis of affecting the property right of good will would be negatived by the fact that over a period

of time a certain area is left untouched by the plaintiff company because they did not attach enough substance to the business that might be developed in that area, and hence they leave it alone. Now, you have a factual situation there. It seems to me from the evidence that there was not any substance to it, at all, that there was not any business or good will that was attached to what the plaintiff's store in San Francisco would get out of this particular area down in San Jose, and therefore there was not any effect upon, or substantial effect upon the plaintiff's property right, even assuming that the acts of the defendant were violative of that property right." (Tr. p. 338.) (*Italics added.*)

In view of the foregoing it is hardly necessary to point out that appellant's contention that the facts under discussion are "uncontradicted" or "without dispute" is, if not reckless, at least careless. Consequently, appellant's objection that no finding was made that "appellant's stores in San Francisco and Oakland had established a substantial nucleus of business with residents of San Jose and communities nearby" is without merit.

From the foregoing, it follows that the second portion of the same objection, based upon the erroneous assumption that the court must necessarily have found that appellant had a substantial nucleus of business in San Jose, must inevitably fail. That objection is that the court also failed to find that:

"* * * on the basis of such business and as a part of appellant's plan, policy and practice of

expanding from the populous cities in which it had first established its stores, into the smaller communities nearby appellant had leased additional locations in which to open new stores in San Jose, Palo Alto, San Mateo and Burlingame." (App. Br. p. 23.)

Breaking down the finding which it is insisted the trial court should have made, it is observed that it is demanded that the trial court should have found:

1. Appellant had a substantial nucleus of business with people from San Jose and communities nearby.

2. On the basis of such business, appellant had leased stores in San Jose, Palo Alto, San Mateo and Burlingame.

3. Appellant had leased such stores as a part of appellant's plan, policy and practice of expanding from the populous cities in which it first established stores into the smaller communities nearby.

Since it has been demonstrated that a finding that appellant had "a substantial nucleus of business" would have been contrary to the evidence, it follows that a finding that appellant leased such stores on the basis of such business would be likewise without foundation of fact. The court did find that appellant had leased a store in San Jose with the intention of opening a store (Finding IV, Tr. p. 32), and this finding is directly responsive to the corresponding allegations of the complaint. (Comp. Par. 3, Tr. pp. 3-4.) The complaint did not contain any allegations to the effect

that such leasing was based upon any "nucleus of business," or in pursuance of any "plan, policy and practice of expanding" from populous cities into smaller communities. Consequently, appellant is in no position to complain that findings were not made upon issues which were not raised by the pleadings.

"The rule is that findings should be confined to the facts in issue, the province of the court being to determine but not to raise issues."

Rich v. Moss Beach Realty Co., 43 Cal. App. 742, 744.

However, even if it be assumed that the pleadings did raise an issue as to whether appellant made the lease in San Jose upon the basis of the "nucleus of business," or pursuant to a plan or policy of expansion from large cities to small communities, the evidence would not support such findings.

As already pointed out, there was no "substantial nucleus of business *with* residents of San Jose" and certainly no business whatever *in* San Jose. Consequently, the lease in San Jose could not have been taken for that reason. Obviously, it was taken for the same reason that appellee took his lease, namely, a desire to enter into business *in* San Jose, to get business not otherwise obtainable (Tr. p. 137) independently of any so-called "nucleus."

Similarly, the evidence does not support the contention that appellant made its lease in San Jose pursuant to a plan of expansion from large cities to smaller communities. While Mr. Magee testified that

his company did have such a policy (Tr. pp. 76, 137) the example he gave, of the appellant's practice in California, did not support his testimony. He testified as follows:

“Q. What determines the place where the company will open new stores?

A. Using San Francisco as an illustration, we first opened in San Francisco to establish business here, and eventually opened in the surrounding areas to San Francisco. We did likewise in Los Angeles, and that is true of the other large cities.” (Tr. pp. 75-76.)

Mr. Magee's testimony was directly contrary to the facts, as demonstrated in the schedule of appellant's store openings set forth at page 8 of appellant's brief. The first store opened in California was in 1930, in what appellant would undoubtedly define as an outlying community, namely, Pasadena. In the same year stores were also opened in Santa Barbara, San Diego, San Bernardino and Los Angeles. Obviously, these stores do not support the assertion that there was a “practice of expanding from the populous cities in which it had first established its stores into the smaller communities nearby.” Since all the stores were opened in the same year, it is quite plain that there was no “nucleus” and no plan of expansion. The stores were patently opened in each place for the plain and simple reason that appellant desired to do business *in* each place, regardless of “nucleus” or “expansion.” This is further borne out by the fact that the only other store opened in Southern Cali-

fornia between 1930 and 1942, a period of twelve years, was in Long Beach, in 1931. Since this date is so close to the opening of the other stores, it lends no support to any argument based upon "nucleus of business" or "policy of expansion", but rather indicates that all the Southern California stores, including Long Beach, were opened at approximately the same time and for the same reason, reluctantly admitted by Mr. Magee: to do business in each community through a store in that community, regardless of the proximity of other stores of appellant. (Tr. pp. 137-138.) Certainly the practice in Southern California does not bear out any high-flown theories of "nucleus of business" and "policy of expansion" into smaller communities.

Turning to Northern California, we find that appellant took a lease in Sacramento in 1929, with the intention of opening a store. Appellant changed its corporate mind in 1932, and "bought itself off the lease." (Tr. pp. 132-3.) This was not an isolated instance, as Mr. Magee admitted that there were other instances where leases had been taken, and no store opened, but he did not give them all, because, he said: "That would take too much of the court's time to do it." (Tr. pp. 133-4.)

Mr. Magee admitted a similar incident with regard to San Jose, the very same city involved in the instant case. Appellant took a lease there in 1931 or 1932 and subsequently gave it up. The following testimony by Mr. Magee, on cross-examination, reveals the real nature of appellant's "plan, policy and practice."

“Q. Mr. Magee, you stated in response to Mr. Goldberg’s question that those leases that you bought your way out of in 1932 and thereabouts was on account of the depression?

A. That’s right.

Q. By that you meant to say it was not profitable for you to continue to keep those leases?

A. We weren’t ready at that time to expand our business, and open new stores.

Q. In other words, the simple fact is you decided it wasn’t profitable for you to keep the leases or to open stores where you did have leases?

A. The answer is, it was not profitable, or it was not propitious at that time to open new stores.

Q. So you decided to get out until it was?

A. We decided where we could buy ourselves out of leases to do so, and then at a later time open stores in those communities.

Q. *And your object in going in any place is to go in if you think it is going to be profitable, and stay out if it isn’t going to be profitable?*

A. *That is true.*

Q. You mean to say you go into a community if you think it is going to be profitable?

A. We go into a community if we thought it was going to be profitable.

Q. And if you go into a community where you thought it was going to be profitable, and if after passage of time you find it is not going to be profitable, you get out?

A. We never assumed at any time it wouldn’t be profitable to have a store in San Jose. We believed it wasn’t propitious to have one there, to retain the lease.” (Tr. pp. 152-3; italics added.)

It should be observed that while Mr. Magee testified that "we weren't ready at that time to expand our business and open new stores," he could not have been referring to the policy of "expansion from large cities to small communities" urged by appellant, because Sacramento and San Jose are obviously small communities, compared to San Francisco and Oakland. But appellant had no stores in either of these latter cities until 1934! (App. Br. p. 8.) Consequently, Mr. Magee could not have been talking about expanding from a large city to a smaller community to take advantage of a "nucleus of business" which did not exist. Since the leases in Sacramento and San Jose were taken and given up before appellant had a store in either Oakland or San Francisco, the testimony hardly supports the existence of a plan of expansion from large cities to small communities.

It is noteworthy that the first two stores actually opened in Northern California were in Oakland and San Francisco, in the same year, 1934. This also does not give support to the existence of a plan of expansion. Similarly, the third store in Northern California was opened the following year, on Market Street in San Francisco. Surely, the opening of a second store in San Francisco, a few blocks from the Grant Avenue store, gives no support to the "nucleus of business" contention or to the existence of a "plan of expansion" from large cities to smaller communities. Market Street is not a "smaller community nearby" Grant Avenue. It is obvious that as was the

case in Southern California, appellant opened a group of stores in one general area at about the same time for the purpose of doing business in the respective areas, and that there is no evidence of a "policy of expansion" from larger to smaller communities. The evidence is to the contrary.

For example, the next store opened in Northern California was in Stockton, in 1940. If the "nucleus of business" theory was a fact, the next store should have been in San Mateo, San Rafael, Hayward or any other of the "smaller communities nearby" San Francisco and Oakland, because obviously a store in either of these cities would do more business with people from closer communities. Again refuting appellant's contention is the circumstance that the next store opened after Stockton outside the Los Angeles area was in Bakersfield, in 1943. The burden would appear to be upon appellant to point out how the opening of the store in Bakersfield illustrates a plan of expansion from the larger cities to smaller nearby communities, particularly in view of the circumstance that in the meantime no stores were opened in communities near to San Francisco. The same observation applies to the opening of the Fresno store in 1944, after the commencement of this action. (Tr. p. 122.)

There is no doubt that the facts do not support the contention of appellant. A finding such as that urged would not be supported by the evidence and is not within the issues. The attitude of the trial court on the subject is indicated by the following:

“Mr. Goldberg. I would like to say this: We are not relying on any unannounced or secret intention and we are not relying exclusively by any means on the fact that we had negotiated a lease which was in existence when the defendant opened his business; but we do rely on the general course of conduct in the operation of its business, that it is an expanding business, that it already had thirteen stores in California and was actually negotiating and had negotiated leases for many other purposes; that it was part of its practice to expand into areas like San Jose.

The Court. The record will show whatever the policy of the company is in that respect. I will say for the benefit of counsel for the defendant in that regard that I can't see anything to that point, at all.” (Tr. pp. 168-9.)

It is respectfully submitted that the conclusion of the trial court is wholly appropriate and correct. It is therefore unnecessary to discuss what would be the effect on this case if the evidence showed a “policy of expansion.” Unfortunately, for appellant, even if the evidence supported its contention, it would not follow that appellant would have a pre-emptive right to invade communities surrounding big cities whenever it suited their pleasure, and that others must keep out in the meantime. The authorities are to the contrary.

Griesedieck Western Brewery Co. v. Peoples Brewing Co. (C.C.A. 8th) 149 F (2d) 1019, 1022;

Yellow Cab Co. of San Diego v. Sachs, 191 Cal. 238, 243-4;

Eastern Outfitting Co. v. Manheim (Wash.)
110 Pac. 23;
National Grocery Co. v. National Stores Corp.
(N. J. Ch.) 123 Atl. 740, 742-3.

It is not necessary to discuss the authorities cited by appellant to support its opposing contention. It is sufficient to point out that in every instance where relief was granted, there was evidence either of fraudulent intent or that the aggrieved party had first done business in the territory in question, by mail order, travelling salesmen or otherwise.

E. Appellant complains next that:

“The findings fail to reflect in any manner the material evidence showing that appellee had never done business as ‘Lerner’s’ prior to the time that he opened his store in San Jose, that he had never engaged in the retail business anywhere, nor in any business located in San Jose.” (App. Br. p. 24.)

It may be assumed that what appellant means to indicate is that there should have been a specific finding on each of the above points, and that the absence thereof is prejudicial and reversible error.

In view of the findings already discussed, to the effect that appellee was first in the field in the retail ladies ready-to-wear business in San Jose under a name including the word “Lerner’s” it is difficult to see how plaintiff can be prejudiced by the absence of a finding that appellee had never before done business as “Lerner’s” even if it be assumed, contrary to the

evidence, that such a finding were justified. (See Tr. pp. 267-269.) However, the answer admits when appellee commenced doing retail business in San Jose (Tr. p. 24), and the court found in considerable detail when and how he commenced doing business in San Jose. (Findings IV and V, Tr. pp. 32-33.) Consequently, the objection is not only without legal merit; it is contrary to the record.

The next grievance, that the findings do not show that appellee never engaged in the retail business anywhere, is wholly irrelevant. No matter which way the fact might be, the rights of the parties in the premises would not be altered in any degree by a finding one way or another, and appellant has not undertaken to show how the absence of such a finding is prejudicial.

The same is true of the objection that there is no finding that appellee had not previously engaged in any business in San Jose. It is impossible to see what effect this has on the judgment, and appellant has offered no assistance in that regard. The trial court did find when appellee did commence business in San Jose, and that such commencement preceded the entry of appellant into the field. That is all that is material in supporting the judgment.

F. Continuing to examine appellant's objections to the judgment in this case, it is next objected that the court found "that appellee took reasonable precautions to prevent confusion between his business and that of appellant. (Tr. p. 33, Finding V.) The evi-

dence clearly shows directly to the contrary.” (App. Br. p. 24.) Appellant has not in the brief favored this court or appellee with all the evidence on this subject. There was a great deal of detailed evidence on the subject of the appearance and construction of the respective stores. (Tr. pp. 86, 92, 103, 120, 130-135, 138, 149-152, 153-160, 178-180, 230-233.) Similarly, there was much evidence on the form of newspaper and other advertising used by appellee in San Jose. (Tr. pp. 12-15, 234-262.) Appellant does not advertise in newspapers, periodicals, or in any other manner than in the use of the name “Lerner Shops” on the store fronts of the several stores, and the use of such name on paper and bag containers and price tickets attached to merchandise displayed in the show windows of the respective stores. (Finding III, Tr p. 32.)

Upon the basis of all this evidence, the court made the finding objected to, that appellee took reasonable precautions to avoid confusion. Obviously, the court drew conclusions from the evidence diametrically opposed to the conclusions drawn by appellant, and so stated in the course of the proceedings. (Tr. pp. 293-294.)

Also entering into the court’s conclusion are the circumstances as to the distance between the stores of the respective parties and area and population to which they catered, respectively. (Tr. pp. 51-52, 296.)

In reaching a conclusion as to the likelihood of confusion between the stores of the parties located in separate cities, as in this case, the court was

undoubtedly aided by the circumstance that appellant and another chain of stores in the same line of business, also having the word "Lerner" in the name, are apparently doing business without confusion or damage to each other in cities located at distances similar to the distance between San Jose and San Francisco, and which Mr. Magee admitted were in what he considered the same "trading area." In fact, Mr. Magee did not even know whether appellant or the competing chain was the first to open stores in the respective so-called "trading areas". Thus, it is apparent that appellant may have done exactly what it objects to here, and without confusion or damage to any one, by opening stores in analogous circumstances where a competing chain using the word "Lerner" in its name was already in business. (Tr. pp. 170-173.) For example, a wholly unrelated chain organization doing business under the name of Lerner-Vogue, or J. S. Lerner-Vogue, has four stores in Kansas City. Appellant, or one of its subsidiaries has a store at Topeka and another at Wichita, Kansas. The court was entitled to take judicial notice that Topeka is about 68 miles from Kansas City, although Mr. Magee, who testified about appellant's "expansion policy" into surrounding communities testified he did not know the distance. Mr. Magee did know that Wichita was about 100 miles from Kansas City. Yet Mr. Magee, did not discover that the competing firm was in business until about ten years after it commenced to do business! (Tr. pp. 141-144, 170-175.) Certainly this was evidence that confusion was not inevitable between

stores located as in the case at bar, and using the word "Lerner" as part of the name.

It is patent that appellant's real objection is, not that the findings of the court in this respect are contrary to or unsupported by the evidence, but that they are contrary to appellant's view of the evidence.

G. Appellant also complains that:

"There is no finding * * * bearing directly upon appellee's original intention in designating his store as 'Lerner's'." (App. Br. p. 25.)

No comment is required here except to refer to Findings V and VI "bearing directly" on appellee's good faith and conduct in the premises. The evidence in support of this finding is found in appellee's testimony that since 1938 or 1939 he had had the intention of opening a store there under his own name and had negotiated for a location there from time to time until he acquired the lease of his present premises. He had resided on the Peninsula for about nine years and had become widely acquainted in and about San Jose, and counted on his acquaintanceship to assist his business. There was no evidence that appellee knew of appellant's intention to open a store in the area. (Tr. pp. 266-274.) This evidence amply supports the court's findings of appellee's good faith.

H. The objection entitled:

"The finding that appellee's newspaper advertising showed the differences between the two businesses, is squarely contrary to the evidence" (App. Br. p. 25),

is so clearly a question of fact for determination by the trial Court that the mere statement of the objection answers itself. There was a great deal of evidence on the subject of the differences in the type and quality of merchandise and price ranges of the respective businesses, and of the character of the newspaper advertising of these matters by the appellee disclosing these differences. (Tr. pp. 12-15, 162, 199-205, 234-264-266, 272-282.) Obviously, appellant is really contending that the conclusion of the court is contrary to its view of the evidence, rather than that the evidence is "squarely contrary" to the findings. Proof of this is found in the fact that in support of this argument appellant states that:

"* * * such advertisements solicited the purchase of the same items of merchandise as are sold in appellant's stores, and show such items at prices which are in the same range as those of appellant." (App. Br. pp. 26.)

Even if this were the effect of the evidence it is difficult to see how appellant is damaged thereby. If appellee advertises in a San Jose paper, a fur trimmed coat, for example, for sale in San Jose, at a price which is within the *price range* of appellant's coats on sale in San Francisco, it does not follow that anyone reading the advertisement in San Jose must necessarily conclude that appellant is the owner of the store. The evidence showed that appellant sold fur trimmed coats in a price range from \$24.95 to \$79.00 (Tr. p. 185) while appellee's price range for fur trimmed coats was \$49.95 to \$110.00. (Tr. pp.

256-257.) Now, if appellee advertised a fur trimmed coat for say, \$75.00, it is ridiculous to argue that such advertisement of necessity must lead a resident of San Jose to believe that appellee's store belongs to appellant. It was clearly a matter for the trial court to determine what, if any, effect such evidence had in the ultimate question of whether there was confusion or unfair competition. The mere failure of the court to agree with appellant's views does not make its conclusions "squarely contrary to the evidence".

I. Appellant objects that the finding that appellee's store is of different character and appearance from appellant's stores, so as to make confusion improbable, is unsupported by evidence, and that the record is "directly to the contrary" of the finding. (App. Br. p. 27.)

Appellant says that "appellee's store is similar in size to appellant's stores on Grant Avenue in San Francisco and in Oakland." We are not referred to any evidence showing what is meant by "similarity in size". Whatever it may mean, it certainly does not support the contention that the finding of sufficient dissimilarity is contrary to the evidence. The mere similarity of the size of stores does not conclusively establish that confusion must follow.

The same is true of the argument that "appellee's designation of his store as Lerner's, on his billboard type of sign, and on his show-windows, boxes and bags, *while not identical with the designation used by appellant in such instances*, nevertheless consists

almost entirely of the name ‘Lerner’ * * *’ (App. Br. p. 27.) (Italics added.)

It was obviously a matter of fact for the trial court to determine whether the “not identical” designation was sufficiently “not identical” to avoid confusion. In any event evidence of the use of the word “Lerner” in an admittedly “not identical” manner is certainly not evidence “directly to the contrary” of the finding.

Another point of similarity which, appellant urges, is contrary to the finding is that “the same articles of merchandise as appellee sells are sold by appellant and the price ranges of the parties overlap”. (App. Br. p. 27.) This point has been dealt with above. Suffice to say here that this fact is not inconsistent with the finding in question.

Clearly, the fact that there was a general similarity of size of stores, a “not-identical” use of the word “Lerner” and sale of the same kind of merchandise in overlapping price ranges, does not support the contention that appellee’s store was not so different that no person exercising ordinary care would be confused.

J. Appellant complains that the finding that there had been no confusion between the businesses of the parties was contrary to the evidence. (App. Br. p. 28.) There was no direct evidence that any person had dealt with appellee, believing that he was dealing with one of appellant’s stores. The evidence was

all by employees of appellant, at second or third hand. (Tr. pp. 95, 196-197, 214, 228.)

However, even if the testimony had been given by the customers themselves, it would not have been conclusive upon the trial court. It was for the trial court to give it such weight as it deserved and to determine if the confusion was reasonable, or the result of carelessness and inattention.

American Automobile Ass'n. v. American Automobile Owners Ass'n., 216 Cal. 125, 131-142.

Naturally, if the court is not conclusively bound by such testimony when given by the persons who were mistaken, the rule is applicable, *a fortiori*, where the statement of such persons are related in court by third persons, as hearsay. It must be remembered that appellant is not objecting that such evidence was excluded, but only that the court did not give it sufficient weight. This is not reviewable on appeal.

American Automobile Ass'n. v. American Automobile Owners Ass'n., *supra*, at p. 141.

CONCLUSION.

It is respectfully submitted that appellant's specifications of errors presents no reviewable question; and that appellant's objections to the various findings are in the main that the trial court did not draw the same conclusions and inferences from the evidence as appellant, appellant's view not being the only one possible under the circumstances.

The findings are in proper form. They dispose of all material issues and support the judgment. It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,

April 7, 1947.

Respectfully submitted,
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Attorneys for Appellee.

No. 11,347

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LERNER STORES CORPORATION (a corporation),

Appellant,

vs.

WILFRED A. LERNER,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

MAY 9 - 1947

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APPELLANT'S REPLY BRIEF.

- I. THE RECORD AND THE BRIEF FOR APPELLANT PRESENT ISSUES WHICH SHOULD BE CONSIDERED ON THE MERITS. APPELLANT'S BRIEF AND SPECIFICATION OF ERRORS SHOULD NOT BE JUDGED BY THE RIGID RULES APPLICABLE TO ASSIGNMENTS OF ERROR.

The Brief For Appellant sets forth appellant's Specification Of Errors wherein in general terms appellant states the respects in which the trial Court erred. The Specification Of Errors does not include a statement of the material evidence upon which the trial Court failed to make any findings nor a list of the findings which are in conflict with and unsupported by evidence. But the Brief follows the Specification Of Errors with a Statement Of The Evidence which contains appropriate references to the printed Transcript Of Record and a discussion,

under separate bold-faced headings, of each of the findings which is unsupported by evidence and each of the material points upon which the Court failed to make findings. Appellant found it necessary to state the evidence and to discuss the findings in detail because, to a greater degree than in most cases, suits in equity for unfair competition turn upon a detailed analysis and appraisal of all of the items of evidence, and it would be difficult and misleading and involve substantial repetition for appellant to present an adequate summary of the respects in which the trial Court erred except in the manner set forth in the Brief For Appellant, to wit: A general Specification Of Errors followed by a detailed Statement Of The Evidence And Findings. Appellant submits that it has endeavored to prepare its Brief in accordance with the rules of this Court and in a manner which will not inconvenience the Court in the consideration of the case and that the points urged in the Specification Of Errors should therefore be considered on the merits of the argument and authorities set forth in the Brief.

The decisions cited by appellee do not support the criticism of the Brief which he makes. This is illustrated by a consideration of appellee's first citation: *Dreyer Commission Co. v. Hellmich*, 8 Cir., 25 F. (2d) 408. That was an action at law to recover a tax paid under protest. The parties had waived a jury. The trial Court rendered judgment in favor of the defendant. The plaintiff appealed. On appeal the appellant assigned as error the action of the trial Court in finding certain facts as well as failing to

render conclusions of law and judgment in favor of the appellant. The Court of Appeals held that the *Assignment Of Errors* did not permit that Court to review the sufficiency of the evidence. The basis for the decision was not any defect in the *Specification Of Errors* in the appellant's brief; the decision turned upon the well-established rule (in effect prior to adoption of the new Rules of Civil Procedure for the District Courts in 1938) that in jury-waived cases the findings of the trial Court have the same effect as the verdict of the jury, and that in such cases the question of the insufficiency of the evidence cannot be raised by an *Assignment Of Errors* in the appellate Court. This clearly appears from the case which the Court in the *Dreyer Commission Co.* case cites as the authority for the statement quoted in Appellee's Brief, *Tatum v. Davis*, 8 Cir., 283 F. 948. The *Tatum* case also was an action at law in which the parties waived a jury. During the trial the appellant had not made any complaint of rulings of the trial Court. Accordingly, on appeal in such case the sufficiency of the evidence to support the findings was not open to question, the Court stating (p. 949):

"No complaint is made of rulings during the progress of the trial, so the only question here is, whether the facts found are sufficient to support the judgment against plaintiff in error."

Appellee also quotes from the decision of this Court in *Mutual Life Insurance Co. v. Wells-Fargo Bank & Union Trust Co.*, 86 F. (2d) 585. (Appellee's Brief, p. 4.) However, an examination of the opinion of this Court in that case makes doubly clear the inapplicabil-

ity to the case at bar of appellee's contention. In the *Mutual Life Insurance Co.* case the plaintiff brought an action at law against the defendant. There was a jury trial. The verdict and judgment were in favor of the plaintiff. Defendant appealed, seeking a review of the sufficiency of the evidence to support the verdict. The Court of Appeals held that the particular *Assignment Of Error* in question was neither proper nor sufficient to raise the point sought to be considered, citing *Dayton Rubber Mfg. Co. v. Sabra*, 9 Cir., 63 F. (2d) 865, in which this Court stated that a similar *Assignment Of Error* in the appellate Court was insufficient for a review by the appellate Court of the sufficiency of the evidence to support the verdict. This Court held (p. 865):

"This assignment is insufficient to raise the question sought to be presented which must be raised by a motion for a directed verdict or ruling on instructions asked or given during the trial of the case. It cannot be raised by an assignment of error after the rendition of the verdict."

The two additional cases cited in this section of Appellee's Brief, to wit: *Century Indemnity Co. v. Nelson*, 8 Cir., 90 F. (2d) 644, and *Humphreys Gold Corp. v. Lewis*, 9 Cir., 90 F. (2d) 896, are to the same effect.

The rule of the foregoing cases (subsequently changed with respect to jury-waived cases by Rule 52(a) of the Rules of Civil Procedure for the District Courts) was that in law actions, including those where a jury had been waived, the appellate Court reviewed only rulings of the trial Court and not the evidence

as such. Accordingly assignments of error made in the trial Court and pointing out the rulings of that Court deemed erroneous were indispensable. That rule was in sharp contrast to the rule formerly and now applicable to suits in equity, the classification into which the case at bar falls. In the case of *Standard Acc. Ins. Co. v. Simpson*, 4 Cir., 64 F. (2d) 583, the Court, after acknowledging that weight must be given to the findings of the trial judge, nevertheless reversed the decision of the lower Court, and stated (p. 588):

“* * * but in an appeal in equity we review the facts as well as the law, and the review is a real review and not a perfunctory approval. After carefully weighing and considering the evidence in the light of the rule, we do not feel that it is sufficient to justify the conclusion that the company either expressly or by implication vested McCrae with authority to enlarge its liability under bonds previously executed.”

These decisions show that in the case at bar, unlike those cited by appellee, there is no substantive legal obstacle to a review by this Court of the sufficiency of the evidence to support the findings and judgment. With respect to the claimed defect in appellant's Specification Of Errors, appellant respectfully submits that its Brief upon the points relied upon by appellant is in substantial compliance with the rules of this Court and presents the evidence and the law applicable thereto with certainty and in a manner which is calculated to serve the convenience of the Court. (*Monaghan v. Hill*, 9 Cir., 140 F. (2d) 31.)

The questions presented upon this appeal are not governed by appellee's erroneous suggestion that if there was a conflict of evidence upon any issue the findings of the trial Court against appellant are fatal to this appeal. On the contrary, in cases such as the one at bar the rule is firmly settled that the mere existence of a conflict in evidence does not deprive this Court of the power to reverse the decision of the trial Court, and this Court may consider precisely such points as are raised by appellant in this case. As stated in *Sanders v. Leech*, 5 Cir., 158 F. (2d) 486, 487:

“Under that Rule, (Rule 52(a) Rules of Civil Procedure for District Courts) as it plainly reads and has been interpreted by the courts, it is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding. It may reverse, though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.”

See also, *O'Brien, Manual of Federal Appellate Procedure*, (3rd Ed.), where the author states (p. 20):

“Where findings of fact are contrary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand, the Appellate Court has power to reverse the judgment based thereon; while the findings of fact are presumptively correct, they are not conclusive on appeal if against the clear weight of the evidence.”

II, III. REPLY TO PARTS II AND III OF APPELLEE'S BRIEF. APPELLANT'S CLAIM IS THAT MATERIAL FINDINGS ARE NOT SUPPORTED BY EVIDENCE AND THAT ADDITIONAL FINDINGS SHOULD HAVE BEEN MADE.

Appellee devotes pages 12 to 23 of his brief to a discussion entitled “The Findings Support the Judgment”. That discussion does not meet any point raised by appellant. Appellant's complaint as to the findings is two-fold: (1) That the trial Court failed to make findings on material issues; (2) That a number of the findings necessary to support the judgment are not supported by evidence.

Appellant does not contend that the findings made by the trial Court do not support the judgment if such findings are accepted as disposing of all of the issues in the record. The record shows that the findings were prepared by appellee (Tr. 286), and he drew a set of findings which support the judgment. But the trial Court *expressly* and carefully refrained from making findings on undisputed material facts which would militate against the findings prepared by appellee and which would call for a different conclusion in the case. (Tr. 287-288.) The points upon

which the trial Court thus refused to have the findings reflect the record are discussed in the Brief for Appellant at pages 21-31, to which we refer the Court.

Appellee has cited and quoted from several decisions as being cases from which the findings in the case at bar were adopted. But findings in a case containing different facts, even though proper in such other case, are not proper in this case. In fact those decisions from which appellee has quoted show upon the face of the very quotations that they turn upon their particular facts and do not aid in the evaluation of the very different facts contained in the record at bar. Thus in *Griesedieck Western Brewery Co. v. Peoples Brewing Co.*, 8 Cir., 149 F. (2d) 1019, quoted at page 16 of Appellee's Brief, it appeared: (1) That the plaintiff and defendant were not in competition with each other; (2) That the plaintiff had never sold any of its beer in any market in which defendant had sold its beer and the markets in which defendant sold its beer were (to quote the language of the Court) "wholly remote the one from the other".

The Brief For Appellant (pp. 10-13; 15-18) sets forth the evidence in the instant case which, differing from the *Griesedieck Western Brewery Co.* case was: (1) That appellant and appellee are seeking patronage in the same area, it appearing that appellant's three stores in San Francisco and Oakland were patronized regularly and continually by residents of San Jose, Palo Alto, Redwood City, Los Altos and other peninsular communities to the extent of a

substantial number of transactions, and appellee's store likewise is patronized by residents of those same communities; (2) That the cities on the San Francisco peninsula from which appellant and appellee both seek patrons are within the trading area of San Francisco and Oakland; (3) That patrons of appellant's stores have visited appellee's store under the mistaken idea that it was one of appellant's stores. These facts clearly distinguish the *Griesedieck Western Brewery Co.* case. But they are analogous to another case decided by the Court which decided that case, the Circuit Court of Appeals for the Eighth Circuit, to wit, the leading case of *Sweet Sixteen Co. v. Sweet "16" Shop, Inc.*, 15 F. (2d) 920. A reading of the *Sweet Sixteen Co.* case (Brief For Appellant, p. 45), leaves no doubt that upon a record like the one at bar the view of the Circuit Court of Appeals supports the position of appellant in the case at bar.

Appellee's quotation from *National Grocery Co. v. National Stores Corp.*, 123 Atl. 740 (Appellee's Brief, pp. 18-21), likewise reveals that there the defendant was doing business at a place where, at the time of suit, the plaintiff had no customers and that the Court recognized the distinction between such a case and one like the present case, when the Court stated (Appellee's Brief, p. 20):

"For reasons already touched upon, it would be absurd to say that any such intention should permit the preempting of the use of the name (National) *at a place and time where such a supposed business enterprise had no customers or business, and therefore nothing to lose.* It

is entirely too remote and fanciful for the complainant to object to another using a name in a certain locality, *not because he has already established his trade there*, but because he may do so in the future. For it is equally probable he may not. *It is significant that in all the cases cited by the complainant in its brief there was an actual competition between the parties, * * ** (Italics added.)

It will also be noted that in appellee's quotation from that case the Court states that it is obvious, by force of the kind of business in which each of the parties in that case were engaged (the operation of cash-and-carry grocery stores), persons would not drive twenty-five or thirty miles to patronize one of such stores. But with respect to a case, such as the one at bar, it is not unnatural for women to drive from the smaller communities surrounding San Francisco and Oakland to such larger cities to shop for wearing apparel, and the record shows that is what they do. (Brief For Appellant, pp. 10-13.)

Appellee also cites the case of *The Ida May Co. Inc. v. Ida May Ensign*, 20 Cal. App. (2d) 339, as a "similar" case from which he has adopted findings. Appellant submits that there is no similarity between that case and this one. In *The Ida May Co.* case the defendant, a former officer and stockholder of the plaintiff severed all connection with the plaintiff in 1934 and at a later date opened a business dealing in similar merchandise under the name of "Ida May Ensign", which was the full true name of defendant.

The trial Court specifically found that in opening and designating her business defendant did so "under her full name". In short, defendant there did not act similarly to the defendant at bar and did not omit that part of her name which would tend to prevent confusion, nor did the defendant *Ida May Ensign* stress that part of her name "*Ida May*" which was similar to the name of plaintiff's business. The defendant in that case, in using her full name without emphasizing any part thereof obviously attempted to comply with the equitable requirement stated by this Court in the case of *Horlick's Malted Milk Corp. v. Horluck's Inc.*, 9 Cir., 59 F. (2d) 13, as follows (p. 15):

"But where a personal name has become associated in the minds of the public with certain goods or a particular business, it is the duty of a person with the same or similar name, subsequently engaging in the same or a similar business or dealing in like goods, to take such affirmative steps as may be necessary to prevent his goods or business from becoming confused with the goods or business of the established trader."

The very definite distinction between the case at bar and *The Ida May Co.* case is succinctly pointed out in *Nims, Unfair Competition and Trade Marks* (Third Edition) as follows (p. 209):

"It will be seen by the foregoing cases that there is a marked difference between the use of a complete name, first name, middle name, if any, and

surname, and the use of the surname alone. The likelihood of confusion is much increased in the latter use. And there is little doubt but such use of a name will be enjoined, while the injunction will often be refused where a person uses his full name, and uses it honestly.”

At page 21 of his brief appellee cites the case of *Yellow Cab Co. of San Diego v. Sachs*, 191 Cal. 238 and contends that that case was one where a taxicab company doing business in Los Angeles using a name like that used by plaintiff in the same business in San Diego, was denied an injunction upon the ground that they were not operating in the same territory. Appellee has erroneously stated the facts involved in that case. The facts and ruling in that case are set forth hereinafter in the Appendix, page i.

Appellee also cites and relies upon the case of *Eastern Outfitting Co. v. Manheim* (Wash.), 110 P. 23. (Appellee’s Brief, p. 21.) That case discloses the fallacy of appellee’s position more clearly than any argument that could be presented by appellant, for subsequent to the decision therein, the Supreme Court of Washington specifically distinguished it from a case like the case at bar, *Groceteria Stores v. Tebbetts*, 162 P. 54, stating:

“Relying on the rule announced in *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 35 L.R.A. (N.S.) 251, 110 Pac. 93, respondent asserts that, as appellant has established *no place of business* in the city of Tacoma and has done

no business there, it is not entitled to the exclusive use of the word 'groceteria' in that community. It is true, in *Eastern Outfitting Co. v. Manheim*, we held that the fact to be ascertained was, what is the market of the complaining party and his protection in the use of his tradename is coextensive with his market. The court then found that the plaintiff's place of business was in Seattle, and *it was doing no business whatever in Spokane*, and was therefore not entitled to the use of the tradename in Spokane as against defendant, who had, at a large expense, established a business in Spokane. The rule as laid down in the *Eastern Outfitting Co.* case, *supra*, in any event is not applicable here, as it is alleged in the complaint, and admitted by the demurrer, that *appellant is doing business with the people of Tacoma, which makes Tacoma a part of its market.*" (Italics added.)

The uncontroverted evidence in the present case is equal to the allegations in the complaint admitted by the demurrer in the *Groceteria Stores* case.

In concluding this portion of his brief appellee cites several California cases and quotes from *Tomsky v. Clark*, 73 Cal. App. 412 (Appellee's Brief, p. 22) for the apparent purpose of having this Court believe that in California a later comer can use his family name in a competing business with impunity and without regard to the particular mode of use and the harm done thereby. As shown hereinabove, the cases, including the California cases, do not support such a rule.

The case of *Tomsky v. Clark*, is discussed hereinafter in the Appendix, page ii, and from that discussion it will be seen that that case does not support appellee's contention.

IV. REPLY TO PART IV OF APPELLEE'S BRIEF.

A. Appellant's stores are known as Lerner's to the great majority of its customers and prospective patrons.

Appellant has contended that the Court committed prejudicial error in failing to make a finding reflecting the material and undisputed proof that the majority of appellant's patrons and prospective customers identify and designate appellant as "Lerner's". Appellee asserts that since the trial Court found that appellant has never engaged in business in San Jose and that appellee was first in the field in San Jose (Appellee's Brief, pp. 23-24), the issue as to the name by which appellant is known becomes immaterial. Appellant has shown elsewhere herein that the record shows without conflict that prior to the time appellee began business appellant had an established patronage from residents of San Jose and other peninsula communities. The question of the name by which appellant was known and designated by its customers and prospective patrons is therefore one of the vital issues of the case.

The trial Court failed to make a finding in response to the evidence that appellant is known and designated as "Lerner's". Appellee's reference to the evidence

bearing upon this point tends to create an inaccurate impression of what the evidence actually shows. Appellee's assertion that only "some" (Appellee's Brief, p. 24) persons or customers refer to appellant as "Lerner's" is definitely not true. The facts show that a "majority", "most", and practically 100 per cent of the persons doing business with appellant, refer to it as "Lerner's". (Tr. 194, 213, 224, 225-227, 228, 192.) The transcript references on this point at page 24 of Appellee's Brief are not to the contrary and actually support appellant's statement of the evidence.

Appellee further seeks to deprecate the materiality of this evidence and makes the bald assertion that finding that appellant's business was known as "Lerner's" would not call for a different result in this case. In the first place, such a finding would be only one of several which appellant contends the Court should have made and which, if made, would call for a different result. In the second place, a finding that appellant's business was known as "Lerner's" would immediately point up the significance in the conduct of appellee in calling and advertising his business as "Lerner's" though he had never been in the retail business before, had never previously engaged in any business in San Jose and had never before been designated as "Lerner's".

Appellee contends that a portion of Finding VI quoted in his brief (pp. 24-25) makes unnecessary any finding that appellant's business is known as "Ler-

ner's''. That finding, to the effect that persons of ordinary intelligence would not confuse appellee's store with a store of appellant, states merely the broadest kind of conclusions and can be given no greater weight than the facts which may be found in the record to support it. Appellee's claim of the distinctive differences in the style of lettering used on his store front and in his advertising to display the name of his business must be judged by the evidence. A sample of appellee's advertising carrying the name "Lerner's" appears on pages 12-15 of the Transcript. The same name in front of his store appears on the photographs which are plaintiff's Exhibits 9 and 10. The same name in front of appellant's stores appears on the photographs which are plaintiff's Exhibits 1 and 2. In addition, plaintiff's Exhibits 3, 4, 5, and 6 show the lettering on other stores of appellant in California. These various photographs have not been reproduced in the Transcript but are before the Court. They very definitely negative the broad claim of distinction made in Finding VI, particularly when considered in the light of the fact that both the store of appellee and the stores of appellant are known by the public as "Lerner's".

The foregoing consideration of portions of Finding VI does not constitute appellant's complete consideration of that finding. Various elements thereof have been segregated and separately discussed in the Brief For Appellant at pages 25-27.

B. The trial Court should have made a finding showing the reputation which appellant had established.

In subdivision B of Appellee's Brief (p. 27), he contends that appellant was not prejudiced by the omission of the Court to find (in accordance with the evidence) that appellant had established a reputation for selling up-to-date, well-styled apparel at prices below those of its competitors.

Such facts, if found by the Court, would have a definite bearing on the likelihood of confusion between appellee's store in San Jose and appellant's stores, because, appellant having such a reputation, persons would be more likely to confuse stores of appellant and appellee than if appellant did not have such a well established reputation.

Appellee stresses the fact (Appellee's Brief, p. 24) that appellant does not advertise in newspapers. While appellant does not advertise in the conventional way, the evidence is that by means of its many stores located all over the country in the most prominent locations, its millions of customers and many millions of transactions each year, it has accomplished the equivalent of advertising and has built up a reputation for selling up-to-date, well-styled apparel at popular prices (Tr. 216-217) which prices are below those of most of its competitors (Tr. 200) and department stores. (Tr. 65, 66, 117, 216-217.) Appellee seeks to raise some question as to the extent of the evidence on this subject, but an examination of the testimony referred to will show that the evidence on this subject is both complete and undisputed.

Appellee also urges that the failure of the Court to make a finding on this subject is not prejudicial because "the Court found that there was no fraud, confusion or unfair competition". (Appellee's Brief, p. 27.) In the first place it is appellant's conception that one of the requirements in an unfair competition case is that the plaintiff prove that he has established a reputation and good will which the defendant is damaging. (*Nims*, supra, p. 110.) In the second place, appellee is assuming the very point in issue. Merely because the trial Court made a finding that there was no fraud, confusion or unfair competition does not preclude appellant from establishing in this Court that there is no substantial evidence to support such finding. One of the elements in such proof by appellant is that it did have the reputation above mentioned, by reason of the existence of which persons familiar therewith probably would and actually did mistake appellee's store for a store of appellant. It was natural that this should occur, because appellee was a complete unknown in the retail business or in any business in San Jose and he designated and advertised his store under a name which did not point to him, but by reason of its wide reputation it did point to appellant, whose business had become known by the name which appellee saw fit to use, unaccompanied by any means of identifying him with that name.

C. Appellant had an established trade with persons from San Jose and adjacent cities.

Under subdivision C of his Brief (p. 28) appellee attempts to controvert that portion of the Brief For Appellant wherein appellant has shown that the trial Court erroneously failed to make a finding which reflected the undisputed material proof that at the time appellee began business appellant's stores in San Francisco and Oakland included among their customers a substantial number of residents of San Francisco peninsula cities, including San Jose. The evidence on this point is set forth in the Brief For Appellant, pages 11-15, 23. Appellee, in disputing that appellant had established such a patronage, first tries to have the point determined by this Court solely upon the testimony of the witness Graham Magee, to the effect that Mr. Magee did not know how many customers came from San Jose to San Francisco for the express purpose of patronizing appellant, and he would not say whether or not appellant's business in San Jose alone would be characterized as "considerable". An examination of the testimony of Mr. Magee reveals that he was unwilling to state the volume of appellant's business from the outlying portions of the San Francisco trading area in other than general terms because he is an officer of appellant whose headquarters are in New York and whose duties deal with the business of appellant on a national scale; he referred the Court to the business records kept in each of appellant's stores, and preferred to have such records show the specific extent

of appellant's business in San Jose and other peninsular communities. (See quotation from his testimony in Appellee's Brief, p. 34.)

Appellee next purports to consider the records referred to by Mr. Magee (Appellee's Brief, p. 36) and asserts that since the evidence showed that appellant had only 27 transactions per month with persons from San Jose, it did not compel the conclusion that the trial Court should have found that the appellant had established a substantial business. Appellee's treatment of the evidence on this point, is,—to borrow a phrase from Appellee's Brief,—“if not reckless, at least careless”. (Appellee's Brief, p. 37.) Appellee fails to take into account the indisputable evidence referred to in the Brief For Appellant at page 12: (1) That appellant's business records show that in addition to the 324 transactions per year with residents of the city of San Jose, appellant's Market Street store had $2\frac{1}{2}$ times as many transactions with residents of Palo Alto, an additional $2\frac{1}{2}$ times as many transactions with residents of Redwood City, and additional customers from Los Altos, Santa Clara and other peninsular communities; (2) That appellant's Grant Avenue store in San Francisco and its Oakland store obtained additional patronage from residents of each of such communities; (3) That such customers patronize appellant's stores regularly and continually and not merely on isolated occasions.

Appellant submits that the evidence referred to, together with the additional evidence pointed out

hereinabove, demonstrates that appellant had established a substantial business and a substantial number of customers in a trading area which extended down the San Francisco peninsula to and including San Jose. And when it is considered that the evidence further shows that appellee's store is likewise patronized by residents of Palo Alto, Redwood City, Los Gatos, Los Altos and other peninsular communities, as well as San Jose (Tr. 260) and that the two businesses compete for the patronage of the very same persons (See evidence referred to in Brief For Appellant, pp. 16-17) it is clearly seen that the trial Court committed prejudicial error in failing to give effect to such material undisputed evidence, and failing to make specific findings in accordance therewith.

The general statement in Finding III that appellant's patrons included some persons from areas throughout the United States other than San Francisco and Oakland, fails to determine this material issue. Appellee's suggestion in this portion of his brief that appellant is precluded from obtaining a more specific finding on the point under consideration because of the more general language used in plaintiff's complaint is reminiscent of an argument in support of a special demurrer, and is contrary to the letter and spirit of the new Federal Rules of Civil Procedure which require that a complaint contain no more than a short and plain statement of the pleader's claims (Rule 8) and that demurrers, pleas and exceptions for insufficiency of a pleading shall not be used. (Rule 7(c).)

Finally, appellee's emphasis upon that portion of Finding III which states that a substantial part of appellant's customers consist of passing pedestrian traffic does not negative the materiality of appellant's request for a finding that appellant likewise had a substantial and regular patronage from the communities on the San Francisco peninsula. Whether appellant had this last mentioned patronage and whether appellee's store competed for such patronage were important questions in the trial Court.

D. Appellant's business was an expanding one.

Appellee, at page 37 of his brief, makes an effort to avoid the effect of the cases cited by appellant which apply the rule that a prior trader is entitled to equitable protection in the exclusive use of his trade name not only within the immediate locality where his business has been previously conducted but also within such territory as may reasonably be expected to constitute a likely field of normal expansion (see Appellant's Brief, pp. 58-65). Appellee urges that the expansion which appellant admittedly did carry out in California between 1930 and 1944 did not follow a pattern of expanding from populous cities into smaller nearby communities. Apparently appellee hopes in this way to eliminate the effect of the admitted fact that appellant's business has consistently been an expanding business and that the policy of expansion has as consistently been applied in California. Appellee has not cited any case which detracts from the authority of the cases cited by appel-

lant in support of the rule protecting a prior business as above enunciated.

Because appellee could not dispute either the evidence or the law which thus protects appellant against unfair competition in a subsidiary area such as San Jose, appellee has instead raised a purely incidental issue, as to the manner in which appellant has carried out its expansion plan in California. Appellee contends that although the testimony adduced by appellant is that its practice is to open a store first in a populous area and, after establishing in such store a nucleus of business from surrounding areas, to open a store or stores in such areas, the evidence shows that appellant did exactly the reverse in California.

Even if the evidence supported this contention of appellee that would be no answer to the failure of the Court to find in accordance with the undisputed evidence that plaintiff had and actually carried out in California, as elsewhere, a plan of consistent and continuous expansion, and on the basis thereof appellant would be entitled to the benefit of the rule of law above stated. However, the contention of appellee, though unimportant to the real issue, is in fact contrary to the evidence. Appellee argues that rather than first opening in populous areas and then expanding into surrounding areas appellant has in California first started in surrounding areas and then opened in the large cities. In reaching this conclusion appellee has made unwarranted assumptions. The evidence is that appellant opened five stores in Southern Cali-

fornia in 1930. It does not appear in what chronological order these stores were opened. Appellee assumes nevertheless and asserts that the first store was opened in Pasadena, although stores were also opened in that same year in Los Angeles, San Diego, Santa Barbara, and San Bernardino. Based on his unsupported assumption appellee then urges that appellant was acting contrary to its professed plan of expansion because it opened in an area subsidiary to Los Angeles before it opened in Los Angeles. Even if there were support for appellee's assumption, it does not follow that it proves any material departure from appellant's plan. For all that appears, appellant may have been attempting for a long time to obtain a favorable location and lease in Los Angeles and may have actually obtained its Pasadena lease and opened that store after the Los Angeles store had been opened and had demonstrated substantial patronage from Pasadena. San Diego and Santa Barbara, approximately 125 miles and 90 miles respectively from Los Angeles, are each desirable locations and independent centers of population and whether those stores were opened before or after the Los Angeles store does not materially bear upon the incidental issue raised by appellee that appellant did not actually pursue its professed method of carrying out its expansion plans.

As to Northern California, it is not questioned by appellee that the San Francisco and Oakland stores were opened in 1934 and 1935 and that all subsequent stores and locations for stores were acquired thereafter. Appellee stresses the fact that several years

prior to the opening of the San Francisco and Oakland stores appellant had taken leases in Sacramento and San Jose and that this proves that appellant's plan is merely to take leases wherever they give promise of being profitable regardless of any plan of expanding therefrom into the surrounding areas. In the first place, stores in Sacramento and San Jose actually were not opened before the stores in San Francisco and Oakland, and conceivably that could be because appellant at that time decided it should follow the particular method of expansion above referred to. In the second place, Sacramento and San Jose are themselves populous centers with substantial areas for the production of patronage. It well may be that at that particular time appellant was unable to obtain in San Francisco and Oakland the 100 per cent locations which it desired and rather than hold up its entire expansion program in Northern California it determined at least to make a start with available locations in Sacramento and San Jose.

Whatever may be the true reason for the particular method of expansion which appellant did follow, as to which the record is silent, the evidence does show without dispute that appellant has followed a consistent program of expansion not only in other parts of the country, but in California, interrupted only during the period of the financial depression, so that commencing in 1930 and up to the time when appellee opened his store in San Jose appellant had opened in California 14 stores, and had acquired by lease or purchase locations for 14 additional stores, including

locations in San Jose, Burlingame, San Mateo and Palo Alto. On the basis of such evidence and the authorities cited in the Brief For Appellant, pages 57-65, San Jose was clearly within the territory reasonably to be included within the likely field of normal expansion of appellant's business.

Appellee's Brief (p. 46) states that it is not necessary to discuss the authorities cited by appellant because in every instance where relief was granted, there was evidence either of fraudulent intent or that the aggrieved party had first done business in the territory in question by mail order, traveling salesmen or otherwise. The authorities cited by appellant may not however be thus disposed of. There are a number of cases cited by appellant which cannot be distinguished in the manner stated by appellee. Examples are:

Groceteria Stores v. Tebbetts (Wash.), 162 P. 54, (Brief For Appellant, pp. 42-45);

Rainbow Shops v. Rainbow Specialty Shops, 27 N.Y.S. (2d) 390, (Brief For Appellant, pp. 61-62);

Rhea v. Bacon, 5 Cir., 87 F. (2d) 976, (Brief For Appellant, pp. 57-58);

Terminal Barber Shops Inc. v. Zoberg, 2 Cir., 28 F. (2d) 807, (Brief For Appellant, pp. 58-61);

Stewarts Sandwiches Inc. v. Seward's Cafeteria Inc., 60 F. (2d) 981 (D. Ct. N.Y.), (Brief For Appellant, pp. 62-63).

We have found no case and appellee has cited none which is to the contrary. In the cases cited by appel-

lee (Brief For Appellee, pp. 45-56) the complaining party had done no business in the area in question, had no customers in that area and had done nothing from which it could be concluded that such party had any real intention of entering such area at any reasonably foreseeable future time.

E. Appellee took no precautions to distinguish his business from that of appellant.

Subdivision E of the Brief For Appellee (p. 46) discusses appellant's complaint of the failure of the trial Court to find that appellee had never done business as "Lerner's" prior to the time that he opened his store in San Jose. Appellee states that the failure to make such a finding is immaterial and also that "it is contrary to the record". (Appellee's Brief, p. 47.) Appellee makes no reference to the Transcript at this point to support the latter statement nor it is supported by the record. Appellee at another point refers to the Transcript (Tr. 267-269) which indicates that when appellee was in the manufacturing business with his father he called upon the retail trade (not the consumer trade) in San Jose. Appellee did not however contend that either he or his father had ever done business as "Lerner's". He testified to the contrary, namely, that the business was carried on under the name of "L. G. Lerner". (Tr. 269.)

Appellee's contention as to the immateriality of the requested finding is that he was first in the retail ladies' ready to wear business in San Jose under a name including the word "Lerner's" and therefore appellant could not be prejudiced by the absence of

a finding that appellee had never before done business as "Lerner's". This completely begs the question. It is established that at least a majority of the persons doing business with or knowing of appellant refer to it as "Lerner's". It is also established that at the time appellee opened his store in San Jose appellant had customers in San Jose and the surrounding area. When appellee opened his store and called it "Lerner's" and advertised it as such without identifying his business as one belonging to an individual who happened to have the surname of "Lerner", it was inevitable that the persons in San Jose and surrounding area who refer to appellant as "Lerner's" would conclude that it was appellant which was opening the store of appellee. These facts do make it significant that appellee had never before done business as "Lerner's" and the Court should have made such a finding.

The same significance attaches to the fact that appellee had never before engaged in the retail business either in San Jose or anywhere else, and the Court should have so found. Appellee again seeks to dismiss these facts as immaterial but they are most material as a part of the complete picture which establishes that when appellee, who had never engaged in the retail business before and had never been known in any business as "Lerner's" opened a store under that designation, in an area where appellant had customers who knew appellant as "Lerner's", he was deliberately or otherwise misleading a portion of the public in San Jose and surrounding areas into believing that appellee's store was in fact a store of appellant.

F. The evidence does not support the finding that appellee took precautions to distinguish his business from that of appellant.

Appellant has objected to the trial Court's finding that appellee took reasonable precautions to prevent confusion between his business and that of appellant. Appellee contends that there is evidence to support such finding. In his Brief (p. 48) he refers specifically to the form of newspaper advertising used by appellee and that appellant uses only the name "Lerner Shops". Apparently appellee intends thereby to state that since appellee advertised and designated his business as "Lerner's" and appellant itself used only the name "Lerner Shops" appellee was taking precautions to prevent confusion. Appellee however ignores entirely the undisputed evidence that most of appellant's customers and persons knowing of appellant refer to it and know it as "Lerner's". The newspaper advertisements which accompanied the opening of appellee's store (Tr. 12-15) contain no indication whatever that they did not refer to a store of appellant, nor any indication that they refer to a store of an individual making his initial entrance into the retail ladies' apparel field and unconnected with the previously well known business of appellant.

There is no evidence to support appellee's assertion (Appellee's Brief, p. 49) that the stores of Lerner-Vogue in some of the area in Kansas and Missouri where appellant does business did not create confusion or damage. On the contrary, it does appear that litigation ensued, as the result of which Lerner-Vogue changed the name of certain of its stores to "J. S. Lerner-Vogue" and discarded completely the name "Lerner" with respect to its other stores. (Tr. 142.)

- H. Appellee's newspaper advertisements were likely to cause confusion as to identity.

In subdivision H of his Brief (p. 50) appellee in effect admits that appellant and appellee carried competing items at prices which were within the same ranges. He seeks to justify the Court's finding that his newspaper advertising showed the difference between the two businesses by urging (pp. 51-52) that a person reading an advertisement of appellee relating to an article also carried by appellant at a price also charged by appellant would not necessarily assume thereby that appellee's store belonged to appellant. Appellant does not urge and is not required to urge that every person acquiring knowledge of appellee's store or his advertisements was misled or confused; it is sufficient if there was a likelihood that some persons, exercising reasonable care, would be misled. (*Schwarz v. Schwarz*, 93 Cal. App. 252, 255; *R. B. Davis Co. v. Davis*, 11 F. Supp. 269.) And the evidence established, as pointed out hereinabove, that there were persons who actually were misled.

- I. The evidence does not show that appellee's store was distinctive in character or appearance.

In subdivision I of Appellee's Brief (p. 52) he discusses appellant's objection to the finding that appellee's store is of a different character and appearance from appellant's stores so as to make confusion improbable. The evidence shows that appellee's store is approximately 20 feet wide. (Tr. 258.) Appellant's Grant Avenue store in San Francisco has a frontage of 20 feet (Tr. 92), and its Oakland store has a frontage of 18 feet. (Tr. 92.) Appellant used a billboard

type of sign on its stores in San Francisco and Oakland. (Tr. 89-90.) Appellee used the same type of sign. On his sign the most prominent feature and the one occupying most of the space is the name "Lerner's". The same designation was featured on the show windows, boxes and bags. The stores of the parties carried similar items of merchandise in price ranges which overlapped.

Appellee does not and cannot dispute these facts. He has failed to point out any physical features of dissimilarity which would support the finding in question, from which it should be concluded that there is no evidence which does support it.

J. There was actual confusion between the two businesses. There was no evidence to the contrary.

Under subdivision J of Appellee's Brief (p. 53) he asserts that the trial Court was justified in making a finding contrary to the undisputed evidence that persons had dealt with appellee believing that they were dealing with appellant. In the first place the evidence on this point, while given by employees of appellant, was legally admissible (*S. C. Johnson & Son v. Johnson*, 28 F. Supp. 744, 749, affirmed as modified, 116 F. (2d) 427), and in cases of this kind, with rare exceptions, it is the only kind of evidence obtainable, particularly in view of the fact that appellant carries on a cash business and has no list of customers' names or addresses. The case cited by appellee, *American Automobile Ass'n v. American Automobile Owners Ass'n.*, 216 Cal. 125 (Appellee's Brief, p. 54) was one in which there was conflicting

evidence concerning the matter in dispute. Such case is not contrary to the rule that while the trial Court has the right to weigh the evidence it does not have the right arbitrarily to reject the only evidence in the case on a material point. (See, *Grigsby v. Davey*, 207 Cal. 181, 186.) If there were conflicting evidence or the evidence were such as to require some credulity to believe it, or if it had other indications of internal weakness there could be a basis for the exercise of discretion by the trial Court in accepting or rejecting it. But in this case the evidence was not disputed, it was presented by not one, but a number of witnesses, and the confusion testified to was most natural, if not inevitable, in view of the similarity of names, the widespread reputation of appellant, the similarity of merchandise and prices and the fact that theretofore appellee was completely unknown in the retail business and persons who had done business with appellant and referred to it as "Lerner's" and had never done business with or even heard of appellee, would almost of necessity conclude that the store opened by appellee was in fact opened by appellant.

CONCLUSION.

In spite of the findings made by the trial Court and its failure to find on certain material issues, the evidence in this case is such that when considered under the rules applicable to a review by this Court of a case of this kind, it requires the reversal of the judgment for appellee and the granting of relief to

appellant. The nature and extent of the relief to which appellant is entitled is discussed in the Brief For Appellant, pages 66-79.

Under the authorities cited in the opening portion of this Reply Brief this Court may reverse the trial Court: (1) Where the findings are without substantial evidence to support them; (2) where the trial Court misapprehended the effect of the evidence; (3) even though there were evidence which, if credible, would be substantial, if the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

(*Sanders v. Leech*, 5 Cir. 158 F. (2d) 486, 487.)

Appellant submits that the evidence discussed or referred to in its briefs herein fully establishes the following basic facts as uncontradicted or not open to serious question and fully justifying and requiring injunctive relief:

(1) That appellee opened a store in San Jose engaged in the same line of business, carrying similar items of merchandise as the business and merchandise of appellant, and at prices in a price range overlapping the price range of appellant;

(2) That appellant is known by at least a very large majority of its customers and the public as "Lerner's";

(3) That although appellee had never before engaged in the retail business, had never carried on

any business in San Jose, had never been associated with any business known as "Lerner's" and his own name is Wilfred M. Lerner, he designated and advertised his store in San Jose as "Lerner's", without any distinguishing feature to differentiate him and his business from or prevent confusion thereof with appellant and its business; this in spite of the fact that appellee had known of appellant and had been in several of its stores;

(4) That appellant had throughout its long history adopted and pursued a policy of expansion and opening of new stores, not only in other parts of the country but also in California;

(5) That San Jose is within appellant's normal area of expansion and that appellant actually expanded into that city by taking a lease therein in 1941, long prior to the time that appellee opened his store, only the restrictions created by the war having prevented appellant from opening its San Jose store when it became entitled to possession thereof in July 1942;

(6) That when appellee opened his store appellant actually had customers in San Jose and nearby communities and had enjoyed a regular and continuous patronage from that area;

(7) That some of appellant's customers have been confused by appellee's designation of his business as "Lerner's" into believing that appellant had opened one of its stores in San Jose.

The foregoing furnish all of the requisities for injunctive relief in a case of this kind: Similarity if not identity of business and name; competition for the same patronage; actual confusion among customers as to the two businesses; and the prior right of appellant based on the long period prior to appellee's entry during which appellant and its business were known by the name which appellee adopted and which is merely his surname, not his full name.

Had the trial Court found the foregoing as facts, the basis for injunctive relief would be established beyond question. Merely because the trial Court made contrary findings as to some of these facts and no findings whatever as to others, should not deprive appellant of the relief to which it is entitled if in fact the evidence does not support the findings which the trial Court did make and does support findings which would afford relief to appellant. Not only the uncontradicted evidence, but certainly all of the evidence entitled to weight, viewed in the light of what frequently occurs and is known to occur in unfair competition cases of this kind, fully support and require the findings requested by appellant and relief against the unwarranted interference by appellee with the business and the goodwill which over many years appellant has created and built up.

No issue is here involved which would prevent appellee from engaging in any business he chooses at any location or locations he sees fit. There is here involved only the name by which appellee has determined to designate and advertise his business; not his

own full name nor a name under which he has ever before done business or been known; but a name, nevertheless, by which appellant has long been known in a business which it has built up over many years, having a valuable reputation and goodwill which under the law are entitled to protection.

The judgment should therefore be reversed and an injunction issued in favor of appellant for the relief to which it is entitled.

Dated, San Francisco, California,

May 5, 1947.

Respectfully submitted,

JESSE H. STEINHART,

By S. A. LADAR,

Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Yellow Cab Co. of San Diego v. Sachs, 191 Cal.
238.

The facts in this case were that for some time prior to 1920 the defendant Sachs had been engaged in conducting a taxicab business in San Diego under the name of Smith Taxicab Co. In the summer of 1920 he changed the name of this company to Yellow Taxicab Company of San Diego, and began to operate a fleet of yellow taxicabs under that name. In October 1920 one Uhler acting as a promoter of plaintiff corporation began negotiations with a Chicago concern looking to the establishment of a Yellow Taxicab service in San Diego under a system which had theretofore been established and used for approximately six months by the Chicago concern and by a Los Angeles concern. Uhler obtained a contract from the Chicago concern for the purchase of some of the Chicago company's taxicabs, but otherwise neither Uhler nor plaintiff corporation (which he organized) had any connection with the Chicago concern and had no connection whatever with the Los Angeles concern. Plaintiff corporation did not begin actual business operations in San Diego until February, 1921, which was subsequent to the date that defendant had begun to operate in San Diego. In January, 1921, plaintiff sued defendant, contending that the prior use by said Chicago concern of the name "Yellow Cab" and plaintiff's purchase of cabs from said Chicago concern and adoption of its system of

business gave plaintiff a prior right in San Diego to the use of the name "Yellow Cab" or "Yellow Taxicab Co.". The trial Court granted defendant a judgment of nonsuit which was affirmed by the Supreme Court of California. The opinion of the Supreme Court states as the basis for the judgment in favor of defendant the undisputed facts: (1) That the plaintiff was neither a successor nor a licensee of the original Chicago concern, nor in any way connected with the operations of the corporation which was doing business in Los Angeles; (2) that in any event the Chicago concern had never used the name in question in San Diego prior to the time the defendant began doing business in San Diego; (3) that *plaintiff itself* not having carried on any business in San Diego or elsewhere until subsequent to defendant's adoption and use of the name in question, had no cause of action against defendant.

Tomsky v. Clark, 73 Cal. App. 412.

In that case the evidence itself was not before the Court. The appeal was on the judgment roll, and the findings disclosed a situation where the plaintiffs had adopted as a business name the family name of one of the defendants who had been engaged in the collection business in San Francisco for many years before the plaintiffs began business and whose name had become well known and well regarded in San Francisco in such business. The business in which said defendant had been engaged continued to function until 1921 when it was aban-

done for an interval until May 1922. During such interval said defendant, whose name was J. J. Rauer, and his associates were not engaged in the collection business. In the interval between the abandonment of said business and the beginning of a new concern in which said defendant became an officer and stockholder, the plaintiffs started a collection business under the fictitious name of Rauer Collection Company. No person named Rauer was connected with plaintiffs' business. Thereafter defendant Rauer and others organized said corporation in which defendant Rauer became an officer and stockholder and engaged in the collection business. The Court found that instead of the defendants having deceived the public by the use of a name similar to that which the plaintiffs were using, it was in fact the plaintiffs who deceived the public by having adopted a name not their own, under the circumstances above mentioned, and one which the public had long associated with the defendant J. J. Rauer and others. On those facts the trial Court not only refused to enjoin the defendants from using the family name of one of the defendants, but also enjoined plaintiffs from continuing to use a name which was not their own and which in fact deceived the public.

There is certainly nothing in those facts which warrants appellee's use of and emphasis upon his family name in competition with the plaintiff, which, with its predecessors, had used and been known by the same name for many years before appellee started his business. In fact the very quotation which ap-

pellee makes from the *Tomsky* case (Appellee's Brief, p. 22) fails to support appellee's statement and contention that a later comer has an absolute right to use his family name in a competitive business regardless of consequences; he must not resort to artifice or do any act calculated to mislead the public, a precaution which appellee has deliberately ignored in using and emphasizing the name "Lerner" by which appellant is known, rather than using his own name, "Wilfred M. Lerner", by which he was known before engaging in the retail business in competition with appellant.

No. 11350.

see
V. 2446

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MASTER LUBRICANTS COMPANY, a corporation,
Appellant,

vs.

GEORGE O. COOK and MINNIE M. COOK, Bankrupts, and
IGNATIUS F. PARKER, Trustee of the Estate of Bank-
rupts,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Statement of the Case.

The facts as stated by Appellant are approximately correct, except that Appellant attempts to make a point that the minor child had removed from the homestead and had been living with her mother about a week at the time the hearing was had (App. Br. p. 6, lines 8-13; p. 7, lines 7-11; p. 7, lines 24-27). We feel that all this is immaterial, and that the status of the property and the rights of all parties therein were fixed as of the date of bankruptcy, to-wit, June 13th, 1944, at which time it is apparent that the minor child was residing in the homesteaded property, with her father, George O. Cook. However, if the Court should feel that it is material, then we call attention to the fact that the absence of the minor from the

homestead was only temporary [Tr. p. 102, lines 25-27, and p. 105, lines 15-18], and that all of her personal belongings still remained in the homestead. [Tr. p. 103, lines 29-32, and p. 104, lines 1-11.]

Question to be Determined.

The controversy boils itself down to one simple question, to-wit: Does a decree of divorce between a husband and wife, which makes no mention or determination as to a homestead, put an end to the homestead WHEN THERE IS A MINOR CHILD INVOLVED?

Argument.

Counsel has cited numerous cases, but so far as we can see, there is not a single case on this question in which there was a minor child to be considered.

There is little doubt but that where the family relationship is completely severed by a decree of divorce, so that there is no longer any *family relationship* to be protected by the homestead, then and in that case the homestead falls. But what is a "family," and what is a "family relationship?"

The principal cases cited by the Appellant, to-wit, *Zanone v. Sprague*, 16 Cal. App. 333, and *Lang v. Lang*, 182 Cal. 765, were both cases in which there was no minor child, and therefore, when there was a decree of divorce, the family relationship ceased to exist; and therefore there was no one to be protected by the homestead. And it seems quite clear that such a distinction was recognized by the Courts in these cases, because in the *Lang* case the Court expressly based its ruling on the fact that there was no minor child involved. The Court bases its deci-

sion upon the fact that since there was no minor child involved, the family relationship between the husband and wife was severed by the decree of divorce and the qualities of the homestead estate were thereby destroyed; the inference seems clear that if there had been a minor child, the ruling would have been different. The Court says "no family, no homestead!" The inference seems clear that if there *is* a family, the homestead still endures.

And where there is a minor child of the parties, there still remains a "family" even though the husband and wife are divorced. It appears as the underlying note in all of the cases cited by Appellant, that the purpose of the homestead is to protect the "family," and that so long as there is a "family relationship" which is not severed by the divorce, the homestead remains to protect that "family." In the *Zanone* case, *supra*, at page 338, the Court says:

"The 'family' for whose benefit the homestead was selected from the separate property of the husband having been destroyed by the decree of the Court divorcing the parties, the homestead necessarily ceased to exist *as to that family*, * * *" (Italics ours.)

In the present case, the "family" for whose benefit the homestead was originally selected, included Mr. and Mrs. Cook, *and their minor children*. When the Cooks were divorced, there still remained as a family, Mr. Cook and the minor daughter, who were then and there actually residing in the premises and using it as their home. So, the family for whose benefit the homestead was selected, still existed. Instead of a man, his wife, and their minor children, it consisted only of the man and his one minor daughter, but IT WAS STILL A FAMILY, and as such entitled to the protection of the homestead.

The case of *Walton v. Walton*, 59 Cal. App. (2d) 26, while not exactly in point, nevertheless shows what our California Courts believe to be the basic idea behind a homestead. At page 36, the Court quotes as follows:

“The beneficent idea undoubtedly is to make and preserve for every family a shelter of a home, to be free, as long as husband or wife *or a minor child* (italics ours) shall live and occupy it, from the common vicissitudes of life.”

The case of *Remley v. Remley*, 49 Cal. App. 489, holds that if a decree of divorce destroys a homestead, it is only the *final* decree which will have that effect; not the interlocutory. The final decree in the present case was July 1st, 1943. What was the condition on July 1st, 1943? The evidence discloses that on that date, Mr. Cook and his minor daughter were residing as a family, in the homesteaded property. Since the decree of divorce is silent as to any disposition of the homesteaded premises, we must consider whether or not on July 1st, 1943, the family relationship which the homestead was put on to protect, still existed, or whether because of the divorce there was no longer any family relationship to be protected. It seems to us that the answer obviously is that there still existed a family, to-wit, Mr. Cook and his minor daughter; and if there was still a family to be protected, then the law cited in the *Zanone* and *Lang* cases is not in point because the circumstances are different.

It must be remembered that the property in question was at all times, and still is, the joint property of Mr. and Mrs. Cook; they held, and still hold, as joint tenants, and not as tenants in common. The decree of divorce did not mention the property, or deal with it in any way, so

they were and still are, joint tenants. So, under the law, each of them owns the whole of the property, vested as of the date of the original deed, and subject only to the possibility that by the death of either the rights of the deceased one therein would terminate. So the homestead of each is a homestead upon the entire property, and not upon an undivided one-half interest as Appellant seeks to imply.

There is one case, *City Store v. Cofer*, 111 Cal. 482, in which a married woman filed a homestead upon her separate property for the benefit of herself and her husband; she obtained a divorce from him, and the property was not mentioned; a creditor levied upon the property on the theory that the homestead was vacated by the decree of divorce, but the Court held that the homestead was still valid. This particular case is cited by the Court in the case of *Zanone v. Sprague*, *supra*, at page 342, wherein the Court says:

“Whether, under such circumstances, such property would still retain the essential characteristics of a homestead, so far as the ‘former owner’ is concerned, need not be decided here, although such has been declared to be the rule in this State. (*City Store v. Cofer*, 111 Cal. 482, 44 Pac. 168.)”

Summarizing, it seems to Appellees that there is no absolute California decision directly on the point of whether or not a decree of divorce in which no mention of homesteaded property is made, vacates a homestead WHEN THERE ARE MINOR CHILDREN INVOLVED. The nearest case, apparently, is the *Lang* case, *supra*, in which the Court lays down the rule that *in the absence of any minor child* a homestead is vacated by a decree of divorce in which

the property is not mentioned. By expressly making its ruling conditioned upon the fact that there was no minor child involved, it seems to us that inferentially the Court was stating that had there been a minor child involved, its ruling would have been different. And this is still further borne out by the fact that in all of the cases cited by Appellant, there was no minor child involved, and the "family relationship" which was severed by the divorce was only the family composed of the husband and wife, which naturally would cease to exist upon their divorce. Where there is a minor child, there still remains a "family" and a "family relationship" which is not severed by the divorce, and consequently a need for the protection of the homestead.

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

GEORGE GARDNER,

Attorney for Appellees.

No. 11352

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, substituted as party defendant in the place of Defense Supplies Corporation, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

JUL 29 1943

PAUL P. O'BRIEN,

CLERK

No. 11352

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Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the
Northern District of California,
Southern Division

No. 23495-G

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff,

v.

DEFENSE SUPPLIES CORPORATION,
a corporation,

Defendant.

COMPLAINT FOR FREIGHT CHARGES

Plaintiff, Southern Pacific Company, represents
and alleges as follows: [1*]

COUNT ONE

I.

This action arises under a law of the United States regulating interstate commerce in that it arises under Section 6(7) and other sections of Part I of the Interstate Commerce Act, as hereinafter more fully appears.

II.

Plaintiff is now, and was during all of the times hereinafter mentioned, a corporation duly created, organized, and existing under the laws of the State

* Page numbering appearing at foot of page of original certified Transcript of Record.

of Kentucky, authorized to do and doing business in the State of California and in other states, and, as such corporation was, during all of said times, engaged as a common carrier by railroad in the transportation of persons and property for hire in interstate commerce over its lines and in participation with other common carriers by railroad in and through various states of the United States.

III.

Defendant is now, and was during all of the times hereinafter mentioned, a corporation created by the Reconstruction Finance Corporation at the request of the Federal Loan Administrator with the approval of The President, pursuant to authority contained in Section 5d of the Reconstruction Finance Corporation Act, as amended by Act of Congress approved June 25, 1940, said corporation having its principal office located in the City of Washington, District of Columbia.

IV.

During the years 1942 and 1943, beginning in the month of July, 1942, plaintiff, in participation with other interstate common carriers by railroad, at the request of defendant, transported for and on behalf of defendant from Seattle, Washington, to Los Angeles, California, and from Seattle, Washington, to Vernon, California (Vernon being within the tariff switching limits of [2] Los Angeles), upon Government bills of lading, a number of tank car shipments of Benzol. On each of said bills of

lading Defense Supplies Corporation (Seattle Gas Company) is shown as shipper or consignor, and Defense Supplies Corporation, c/o Wilshire Oil Company, is shown as consignee. Plaintiff, as the final and delivering carrier, made delivery of said shipments in accordance with said bills of lading.

Annexed to this complaint and made a part hereof is a statement or compilation marked "Exhibit A," consisting of Sheets 1 to 14, both inclusive, including a Summary Sheet (Sheet 14), showing the details of the transportation services performed as aforesaid, including the kind of property transported, the points between which transportation was performed, the routes of movement, the numbers of plaintiff's bills and dates thereof, the numbers of Government bills of lading and dates thereof, identify of cars in which transportation was performed, dates of delivery, weights of carload shipments transported, applicable tariff rate, amounts billed, amounts paid, balances claimed, reference to settlements made including check numbers and dates of receipt of checks (dates of receipt follow check numbers), and reference to the lawfully published and effective tariffs containing the freight rate or rates applicable to the transportation of the shipments involved and conditions in connection therewith, said tariffs being shown by their abbreviations, which are well known among carriers and shippers.

V.

Each of the carriers participating in said trans-

portation was, at all times herein mentioned, a party to and participated in the tariff or tariffs specifying the applicable rate or rates for said transportation services. Said tariffs and the rates specified therein were duly published and filed with the Interstate Commerce Commission as required by the provisions of Section 6 of [3] Part I of the Interstate Commerce Act and were in legal effect at the time when the shipments were made. Plaintiff based the amounts of the charges billed defendant for said transportation services on the duly published and filed and legally effective applicable rate or rates specified in said applicable tariff or tariffs and shown as aforesaid in "Exhibit A," attached hereto.

VI.

Said shipments were billed and forwarded with charges collect, and plaintiff, being the delivering carrier charged with the duty of collecting the entire freight charges on said shipments, duly presented to defendant its respective bills therefor aggregating the sum of Fifty-six Thousand Seven Hundred Thirty-six and 14/100 Dollars (\$56,736.14) for the transportation charges for said shipments as shown on Sheet 14 of "Exhibit A," attached hereto, based upon the lawful and applicable rate or rates as aforesaid. Defendant, however, refused to make payments in amounts aggregating the sum of Fifty-six Thousands Seven Hundred Thirty-six and 14/100 Dollars (\$56,736.14) for such transportation services, and paid to plaintiff

amounts aggregating the sum of Thirty-three Thousand Six Hundred Eighty-six and 63/100 Dollars (\$33,686.63) only, as shown on Sheet 14 of said "Exhibit A," attached hereto. The amounts so paid were accepted by plaintiff under protest as part payments only and plaintiff subsequently rendered its bills to defendant for the unpaid balances of said transportation charges, which defendant had withheld, but defendant failed and refused and still fails and refuses to pay said amounts or any part thereof.

VI..

By reason of the facts hereinbefore set forth plaintiff is justly entitled to recover from defendant the sum of Twenty-three Thousand Forty-nine and 51/100 Dollars (\$23,049.51), with interest on the portion thereof applicable to each shipment from [4] the date of delivery of each such shipment, until paid.

COUNT TWO

VIII.

(a) This action arises under a law of the United States regulating interstate commerce in that it arises under Section 6(7) and other sections of Part I of the Interstate Commerce Act, as hereinafter more fully appears.

(b) This action arises under the laws of the United States and more especially under Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. L. 954), as hereinafter more fully

appears, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand and 00/100 Dollars (\$3,000.00).

IX.

Plaintiff refers to and hereby incorporates by reference as fully as though here repeated, Paragraphs II, III, IV and V of Count One herein and all of the allegations contained in said Paragraphs.

X.

Said shipments were billed and forwarded with charges collect, and plaintiffs, being the delivering carrier charged with the duty of collecting the entire freight charges on said shipments, duly presented to defendant its respective bills therefor aggregating the sum of Fifty-six Thousand Seven Hundred Thirty-six and 14/100 Dollars (\$56,736.14) for the transportation charges for said shipments as shown on Sheet 14 of "Exhibit A," attached hereto, based upon the lawful and applicable rate or rates as aforesaid. Defendant, however, claiming the right to make land-grant deductions from the full applicable commercial charges, refused to make payments in amounts aggregating the sum of Fifty-six Thousand Seven Hundred Thirty-six and 14/100 Dollars (\$56,736.14) for such transportation services, and paid to plaintiff amounts [5] aggregating the sum of Thirty-three Thousand Six Hundred Eighty-six and 63/100 Dollars (\$33,686.63) only, as shown on Sheet 14 of said "Exhibit A," attached hereto. The amounts so paid

were accepted by plaintiff under protest as part payments only and plaintiff subsequently rendered its bills to defendant for the unpaid balances of said transportation charges, which defendant had withheld, but defendant failed and refused and still fails and refuses to pay said amounts or any part thereof.

XI.

All carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, participating in the transportation of the shipments herein described, and each of them, and all carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, parties to and participating in any land grand route or routes with which the route or routes of movement of said shipments herein described were equalized under agreements with the United States from the standpoint of net charges to the United States for transportation service, and each of them, had, prior to and at the time of said shipments, filed with the Secretary of the Interior of the United States, in the form and manner prescribed by him, releases of all of their, and its, claims against the United States to lands, interests in lands, compensation, or reimbursement on account of lands and interests in lands which have been granted, claimed

to have been granted, or which it was claimed should have been granted to any such carrier or predecessor in interest under any grant to such carrier or predecessor in interest in full and complete compliance with the provisions and requirements of paragraph (b) of Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. L. 954); Southern Pacific Railroad Company and Central Pacific Railway Company, owners and lessors, severally, of portions of the lines of railroad operated by Southern Pacific Company, and Southern Pacific Land Company, transferee of certain interests of Southern Pacific Railroad Company and Central Pacific Railway Company, and each of them, had, prior to and at the time of said shipments, filed with the Secretary of the Interior of the United States in the form and manner prescribed by him, like releases. Each of such releases so filed was approved by the Secretary of the Interior prior to the shipments in question and the performance of the transportation service hereinbefore set forth.

XII.

By reason of the facts hereinbefore set forth plaintiff is justly entitled to recover from defendant the sum of Twenty-three Thousand Forty-nine and 51/100 Dollars (\$23,049.51), with interest on the portion thereof applicable to each shipment from the date of the delivery of each such shipment, until paid.

Wherefore, plaintiff demands judgment against

defendant for the sum of Twenty-three Thousand Forty-nine and 51/100 Dollars (\$23,049.51), together with interest on the portion thereof applicable to each shipment from the date of delivery of each such shipment until paid and for its costs of suit herein incurred.

C. W. DURBROW,

CHARLES W. BURKETT, Jr.,

C. O. AMONETTE,

Attorneys for Plaintiff. [7]

BENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO LOS ANGELES, CALIFORNIA, VIA UNION
PACIFIC RAILROAD COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

G.P.Co. Bill Date Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Aug. 1942 F 105009	7/18/42 319304	UOXX 10252	7/28/42	73940	\$.93 *	\$ 687.64	\$ 408.29	\$ 279.35	
	7/18/42 319303	" 10200	7/29/42	73460	.93 *	683.18	405.63	277.55	
	7/19/42 319302	" 10202	7/28/42	73940	.93 *	697.64	408.29	279.35	
	7/18/42 319301	" 10007	7/28/42	70300	.93 *	653.79	388.18	265.61	
	7/21/42 319306	" 10313	7/31/42	72840	.93 *	677.41	402.20	275.21	932941
						<u>\$3,369.66</u>	<u>\$2,012.59</u>	<u>\$1,377.07</u>	4/23/43
Aug. 1942 F 105210	7/21/42 319305	UOXX 10325	7/31/42	72800	\$.93 *	\$ 677.04	\$ 401.99	\$ 275.05	
	7/21/42 319308	" 10303	9/1/42	72700	.93 *	676.11	401.43	274.68	
	7/21/42 319307	" 10333	9/1/42	72800	.93 *	677.04	401.99	275.05	932941
						<u>\$2,030.19</u>	<u>\$1,205.41</u>	<u>\$ 824.78</u>	4/23/43
Oct. 1942 F 130395	9/25/42 319310	UOXX 10220	10/10/42	74440	\$.93 *	\$ 692.29	\$ 411.04	\$ 281.25	932941
									4/23/43
Totals									
						\$6,112.14	\$3,629.04	\$2,483.10	

* Tariff references: FWTB 1-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 871, Effective May 6, 1941.)
J.P. HAYES X 148 ICC 1413 March 18, 1942.

ENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO LOS ANGELES AND VERNON, CALIFORNIA, VIA UNION PACIFIC RAILROAD COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

S.P.Co. Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds) (To Los Angeles)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Oct. 1942 P 132511	9/25/42 319309	GATX 23986	10/9/42	59820	\$.93 *	\$ 556.33	\$ 330.31	\$ 226.02	932941 4/23/43
(To Los Angeles)									
Oct. 1942 P 141225	9/29/42 319376	UOCX 10254	10/11/42	74500	\$.93 *	\$ 692.85	\$ 411.37	\$ 281.48	932941 4/23/43
(To Vernon)									
Nov. 1942 P 156290	10/29/42 319379	UOCX 10292	11/14/42	74920	\$.93 *	\$ 696.76	\$ 413.69	\$ 283.07	932941 4/23/43
	10/23/42 319377	" 10291	11/10/42	73580	.93 *	685.22	406.84	278.38	
	10/23/42 319378	" 10209	11/10/42	74000	.93 *	688.20	408.62	279.58	
	10/31/42 319380	" 691	11/13/42	74260	.93 *	690.62	410.05	280.57	
						<u>\$2,760.80</u>	<u>\$1,639.20</u>	<u>\$1,121.60</u>	
Totals						\$4,009.98	\$2,380.86	\$1,629.10	

* Tariff References: FFB 1-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 871, Effective May 2, 1941).
J.P. HAYNES X 148 ICC 1413 March 18, 1942.

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Terminal Tariff No. 230-J, ICC 4574, Effective April 9, 1927 (Item 4810-K, Thirty-second Revised Page...147, Correction No. 3078, Effective Sept. 10, 1942).



BENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA UNION PACIFIC
RAILROAD COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

S.P.Co. Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Dec. 1942 F 162996	11/10/42 319381	QATX 14140	12/1/42	60080	\$.93 *	\$ 558.74	\$ 331.76	\$ 226.98	
	11/13/42 319383	UOCX 9076	11/26/42	70200	.93 *	652.86	387.63	265.23	
	11/13/42 319382	" 9073	11/26/42	70040	.93 *	651.37 <u>\$1,862.97</u>	386.74 <u>\$1,106.13</u>	264.63 <u>\$ 756.84</u>	932941 4/23/43
Dec. 1942 F 164951	11/17/42 319384	UOCX 8055	12/4/42	62980	\$.93 *	\$ 585.71	\$ 347.76	\$ 237.95	
	11/20/42 319385	" 8041	12/2/42	60540	.93 *	563.02 <u>\$1,148.73</u>	334.29 <u>\$ 682.05</u>	228.73 <u>\$ 466.68</u>	932941 4/23/43
Totals						\$3,011.70	\$1,788.18	\$1,223.52	

*Tariff References: PTBE 1-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 871, Effective May 6, 1941).
J.P. HAYNES X 148 ICC 1413 March 18, 1942.

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4574, Effective April 9, 1927 (Item 4810-K, Thirty-second Revised Page...147, Correction No. 3078, Effective Sept. 10, 1942).

**BENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHERN PACIFIC
RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.**

S. P. Co. Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Dec. 1942 F 172454	<u>12/4/42</u> 319388	CAIX 4040	12/16/42	59800	\$.93 *	\$ 556.14	\$ 330.20	\$ 225.94	932941 4/23/43
Dec. 1942 F 173020	<u>11/27/42</u> 319386	UOCX 10234	12/9/42	74800	\$.93 *	\$ 695.64	\$ 413.03	\$ 282.61	
	<u>12/1/42</u> 319387	SOXX 691	12/11/42	75060	.93 *	698.06	414.46	283.60	932941
						<u>\$1,393.70</u>	<u>\$ 827.49</u>	<u>\$ 566.21</u>	4/23/43
Jan. 1943 F 180590	<u>12/10/42</u> 319389	UTLX 34888	12/20/42	75760	\$.93 *	\$ 704.57	\$ 418.33	\$ 286.24	932941 4/23/43
Jan. 1943 F 181034	<u>12/12/42</u> 319390	UOCX 10150	12/28/42	74750	\$.93 *	\$ 695.27	\$ 412.81	\$ 282.46	
	<u>12/15/42</u> 319391	UTLX 38875	12/26/42	74840	.93 *	696.01	413.25	282.76	
	<u>12/16/42</u> 319392	" 35224	12/29/42	74980	.93 *	697.31	414.03	283.28	
	<u>12/22/42</u> 319393	" 37553	1/4/43	74620	.93 *	693.97	412.03	281.94	932941
						<u>\$2,782.56</u>	<u>\$1,652.12</u>	<u>\$1,130.44</u>	4/23/43
Totals						\$5,435.97	\$3,228.14	\$2,208.83	
Tariff References: FTB 1-S ICC 1352 July 15, 1940 (Item 4540-B, 3rd Revised Page...243, Correction No. 871, Effective May 6, 1941). J. P. HAYNES X 148 ICC 1413 March 18, 1942.									

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4571, Effective April 9, 1927 (Item 4810-K, Thirty-second Revised Page...147; Correction No. 3078, Effective Sept. 10, 1942).

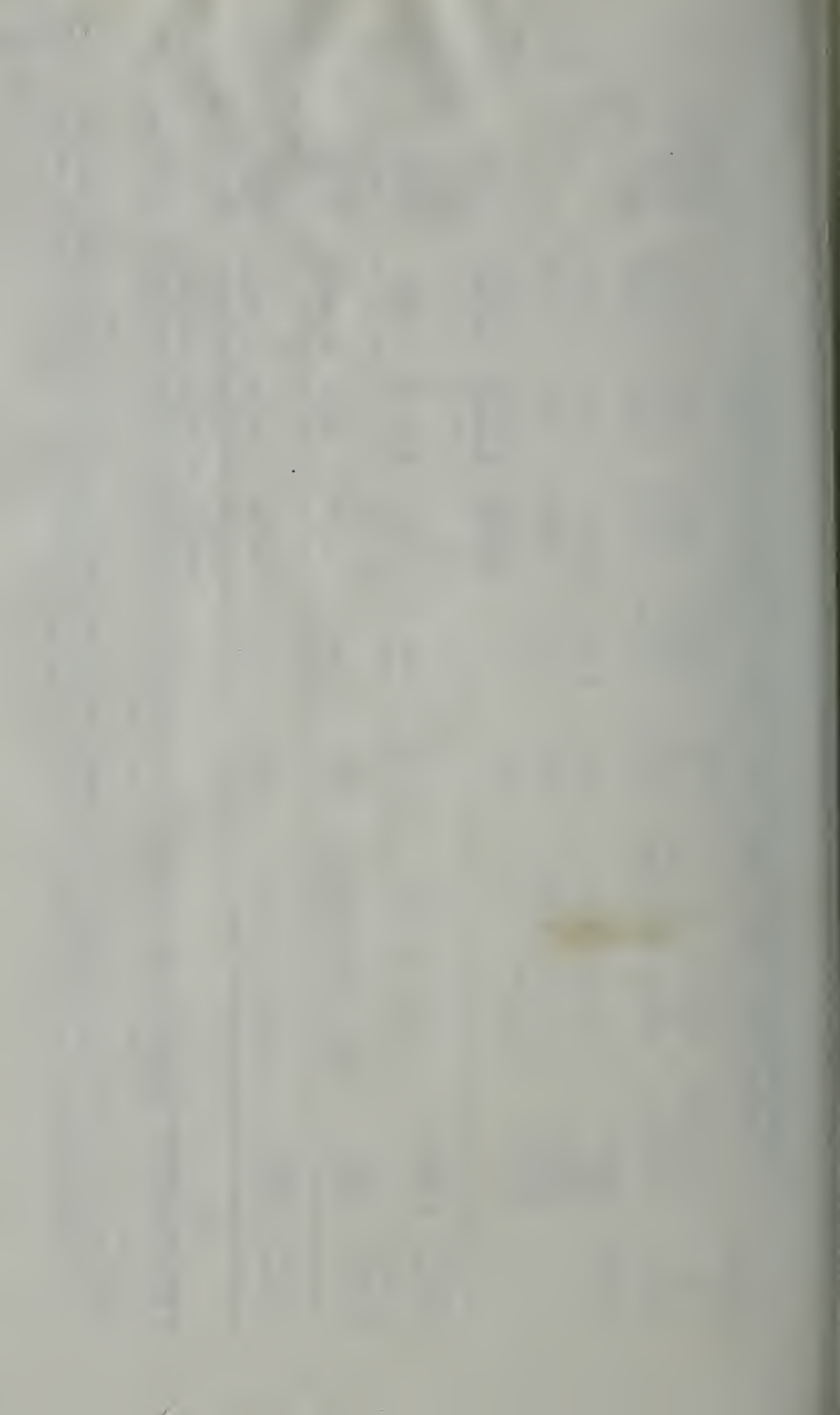
BENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHERN PACIFIC
RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

S.P.Co.

Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Filled (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Jan. 1943 F 182418	12/24/42 319395	UCCX 10298	1/5/43	75420	\$.93 *	\$ 701.41	\$ 416.46	\$ 284.95	
	12/24/42 319394	" 10270	1/5/43	74000	.93 *	688.20	408.61	279.59	
	12/30/42 319398	UTIX 21842	1/12/43	59900	.93 *	557.07 <u>\$1,946.68</u>	330.75 <u>\$1,155.82</u>	226.32 <u>\$ 790.86</u>	932941 4/23/43
Feb. 1943 F 187895	12/29/42 319397	UTIX 71153	1/12/43	60900	\$.93 *	\$ 566.37	\$ 336.28	\$ 230.09	932941 4/23/43
Feb. 1943 F 196240	1/8/43 319402	UCCX 10220	1/21/43	75000	\$.93 *	\$ 697.50	\$ 414.14	\$ 283.36	932941 4/23/43
Feb. 1943 F 191426	1/8/43 319403	UCCX 10073	1/19/43	69940	\$.93 *	\$ 650.44	\$ 386.19	\$ 264.25	932941 4/23/43
Totals						\$3,860.99	\$2,292.43	\$1,568.56	

* Tariff References: FFB 1-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 271, Effective May 6, 1941).
J.F. HAYES X 148 ICC 1413 March 18, 1942.

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4574, Effective April 5, 1927 (Item 4810-K, Thirty-second Revised Page...147, Correction No. 3078, Effective Sept. 10, 1942; and Thirty-third Revised Page...147, Correction No. 3100, Effective Dec. 26, 1942).



**BENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHERN PACIFIC
RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.**

S.P.Co.

Bill Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Feb. 1943 F 191950								
1/21/43								
319405	UTLX 7720	2/2/43	48400	\$.93 *	\$ 450.12	\$ 267.26	\$ 182.86	
1/19/43								
319404	UOCX 10350	2/2/43	75150	.93 *	698.99	415.01	283.98	
12/28/42								
319593	UTLX 36738	1/10/43	75380	.93 *	701.03	416.23	284.80	932941
					<u>\$1,850.14</u>	<u>\$1,098.50</u>	<u>\$ 751.64</u>	4/23/43
Mar. 1943								
F 202008								
2/16/43								
319602	UOCX 8066	2/27/43	60420	\$.93 *	\$ 561.91	\$ 333.63	\$ 228.28	
2/18/43								
319603	GATX 24374	3/1/43	59320	.93 *	551.68	327.56	224.12	
2/22/43								
319604	UOCX 6062	3/11/43	48700	.93 *	452.91	268.91	184.00	932941
					<u>\$1,566.50</u>	<u>\$ 930.10</u>	<u>\$ 636.40</u>	4/23/43
Mar. 1943								
F 205361								
2/24/43								
319605	UOCX 10331	3/6/43	74740	\$.93 *	\$ 695.08	\$ 412.70	\$ 282.38	936584
								5/19/43

Totals

\$4,111.72 \$2,441.30 \$1,670.42

* Tariff References: PTB 1-S ICC 1332 July 15, 1940 (Item 4540-B, 3rd Revised Page...243, Correction No. 871, Effective May 1, 1941).
J.P. HAYNES X 148 ICC 1413 March 18, 1942.

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4574, Effective April 9, 1927 (Item 4910-K, Thirty-third Revised Page...147, Correction No. 3100, Effective Dec. 25, 1942; and Thirty-fourth Revised Page...147, Correction No. 3113, Effective Jan. 26, 1943).

BENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHERN PACIFIC
RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

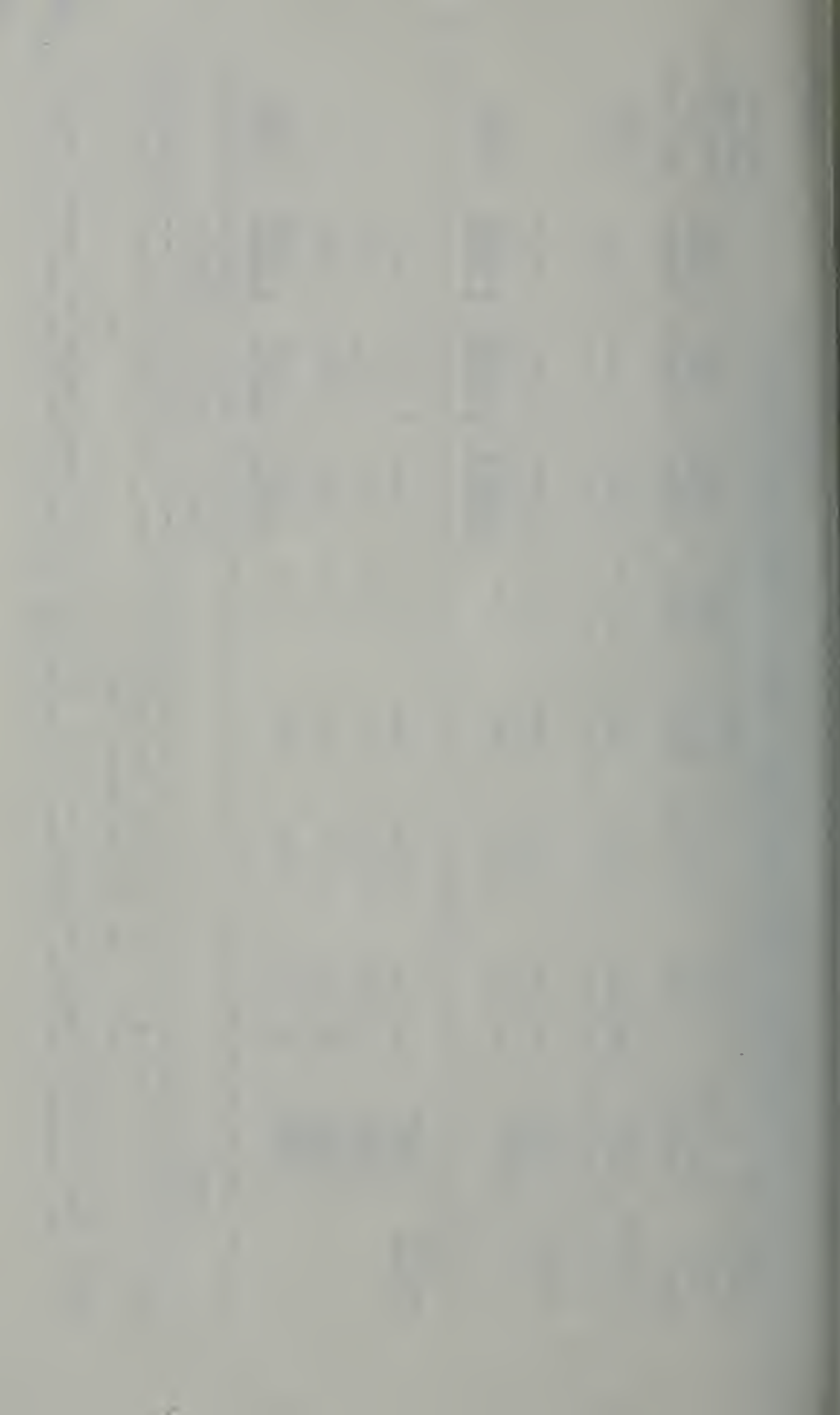
S.P.Co.

Bill Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Mar. 1943 F 207375	UOCX 10239	3/13/43	74300	\$.93 *	\$ 690.99	\$ 410.27	\$ 280.72	935584 5/19/43
Mar. 1943 F 208751	ROX 823 ROX 822	3/18/43 3/18/43	61060 61100	\$.93 * .93 *	\$ 567.86 <u>\$1,136.09</u>	\$ 337.17 <u>\$ 674.55</u>	\$ 230.69 <u>\$ 461.51</u>	935584 5/19/43
Apr. 1943 F 212564	ROX 139 ROX 205 ROX 214 ROX 142	3/18/43 3/19/43 3/21/43 3/23/43	75100 75060 75920 74900	\$.93 * .93 * .93 * .93 *	\$ 698.43 698.06 706.06 <u>\$2,799.12</u>	\$ 414.69 414.46 419.22 <u>\$1,661.95</u>	\$ 283.74 283.60 286.84 <u>\$1,137.17</u>	1150904 5/24/43
Totals					\$4,626.20	\$2,745.77	\$1,879.43	

*Tariff References: FPTS 1-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 871, Effective May 6, 1941).

J.P. 24222. N 148 ICC 1413 March 18, 1942.

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4574, Effective April 9, 1927 (Item 4910-K, Thirty-fourth Revised Page...147, Correction No. 3113, Effective Jan. 26, 1943).



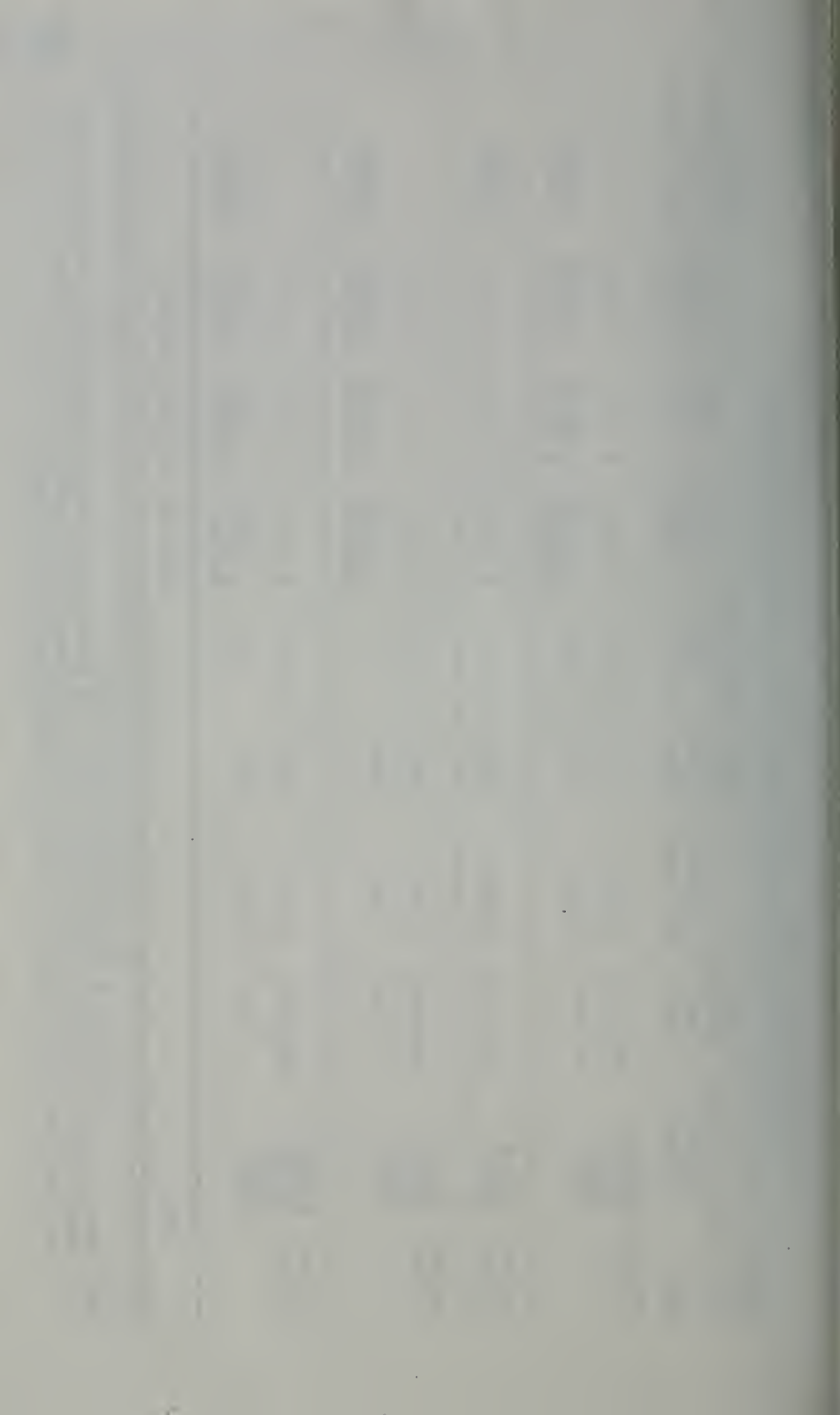
**BENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHERN PACIFIC
RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.**

S.P.Co. Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Apr. 1943 F 212906	<u>3/16/43</u> 319615	USQX 10464	3/26/43	75900	\$.93 *	\$ 705.87	\$ 419.10	\$ 286.77	
	<u>3/13/43</u> 319614	" 10267	3/29/43	76100	.93 *	707.73	420.21	287.52	1150985 5/24/43
						<u>\$1,413.60</u>	<u>\$ 839.31</u>	<u>\$ 574.29</u>	
Apr. 1943 F 213348	<u>3/11/43</u> 319611	ROX 218	3/21/43	74200	\$.93 *	\$ 690.06	\$ 409.72	\$ 280.34	1150985 5/24/43
Apr. 1943 F 213411	<u>3/25/43</u> 319617	USQX 10266	4/2/43	75600	\$.93 *	\$ 703.08	\$ 417.45	\$ 285.63	
	<u>3/25/43</u> 319616	" 10265	4/2/43	75800	.93 *	704.94	418.55	286.39	1151553 5/24/43
						<u>\$1,408.02</u>	<u>\$ 836.00</u>	<u>\$ 572.02</u>	
Apr. 1943 F 214194	<u>3/30/43</u> 319618	USQX 10464	4/11/43	75880	\$.93 *	\$ 705.68	\$ 418.99	\$ 286.69	
	<u>3/30/43</u> 319619	" 10485	4/11/43	75700	.93 *	704.01	418.00	286.01	1151847 5/27/43
						<u>\$1,409.69</u>	<u>\$ 836.99</u>	<u>\$ 572.70</u>	
Totals									\$4,921.37 \$2,922.02 \$1,999.35

Tariff References: PFTB 1-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 871, Effective May 6, 1941).

J.P. RATES X 148 ICC 1413 March 18, 1942.

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 250-J, ICC 4574, Effective April 9, 1927 (Item 4810-K, Thirty-fourth Revised Page...147, Correction No. 3113, Effective Jan. 26, 1943; and Thirty-fifth Revised Page...147, Correction No. 3129, Effective Mar. 25, 1943).



REVOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHERN PACIFIC RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

G. F. Co. Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
July, 1943 F 234510	5/17/43 319620	GATX 24374	58900	\$.88 *	\$ 518.67	\$ 307.96	\$ 210.71	1809627 9/14/43
July, 1943 F 234369	5/4/43 319624	UOXX 8040	59900	\$.88 *	\$ 527.12	\$ 312.97	\$ 214.15	
	6/22/43 319691	GATX 4040	58920	.88 *	518.50 <u>\$1,045.62</u>	307.85 <u>\$ 620.82</u>	210.65 <u>\$ 424.80</u>	1811189 9/24/43
July, 1943 F 234370	7/1/43 319694	UOXX 10243	73100	\$.88 *	\$ 643.28	\$ 381.05	\$ 262.23	
	7/1/43 319693	GATX 14140	58820	.88 *	517.62	307.32	210.30	
	7/1/43 319692	CYCX 499	59440	.88 *	523.07 <u>\$1,683.97</u>	310.56 <u>\$ 998.93</u>	212.51 <u>\$ 685.04</u>	1811189 9/24/43
Totals					\$3,246.26	\$1,937.71	\$1,320.55	

*Tariff Reference: YTTB 1-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 871, Effective May 5, 1941).

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4574, Effective April 9, 1927 (Item 4810-K, Thirty-fifth Revised Page...147, Correction No. 3129, Effective Mar. 25, 1943; and Thirty-sixth Revised Page...147, Correction No. 3150, Effective Jun. 8, 1943).

BENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHERN PACIFIC
RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

S.P.Co. Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Aug. 1943 F 241295	7/5/43 319695 7/5/43 319696	UOCX 8051 * 8047	7/17/43 7/16/43	61100 59320	\$.88 * .88 *	\$ 537.68 522.02 <u>\$1,059.70</u>	\$ 319.75 310.43 <u>\$ 630.18</u>	\$ 217.93 211.59 <u>\$ 429.52</u>	1811189 9/24/43
Aug. 1943 F 245885	7/10/43 319697	GATX 4040	7/23/43	59000	\$.88 *	\$ 519.20	\$ 308.27	\$ 210.93	1813181 10/2/43
Sept. 1943 F 249883	7/24/43 319699 7/24/43 319696	CYCX 499 GATX 14140	8/4/43 8/7/43	59160 58700	\$.88 * .88 *	\$ 530.61 516.56 <u>\$1,037.17</u>	\$ 309.10 306.71 <u>\$ 615.81</u>	\$ 211.51 209.85 <u>\$ 421.36</u>	1966581 10/26/43
Sept. 1943 F 256695	8/18/43 319700	CYCX 499	8/31/43	59180	\$.88 *	\$ 530.78	\$ 309.21	\$ 211.57	1971865 11/23/43
Oct. 1943 F 363292	9/10/43 319743	GATX 91042	9/23/43	58220	\$.88 *	\$ 512.34	\$ 304.19	\$ 208.15	1971865 11/23/43
Totals									\$3,649.19 \$2,167.66 \$1,481.53

Tariff Reference: FFB 1-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 871, Effective May 6, 1941).

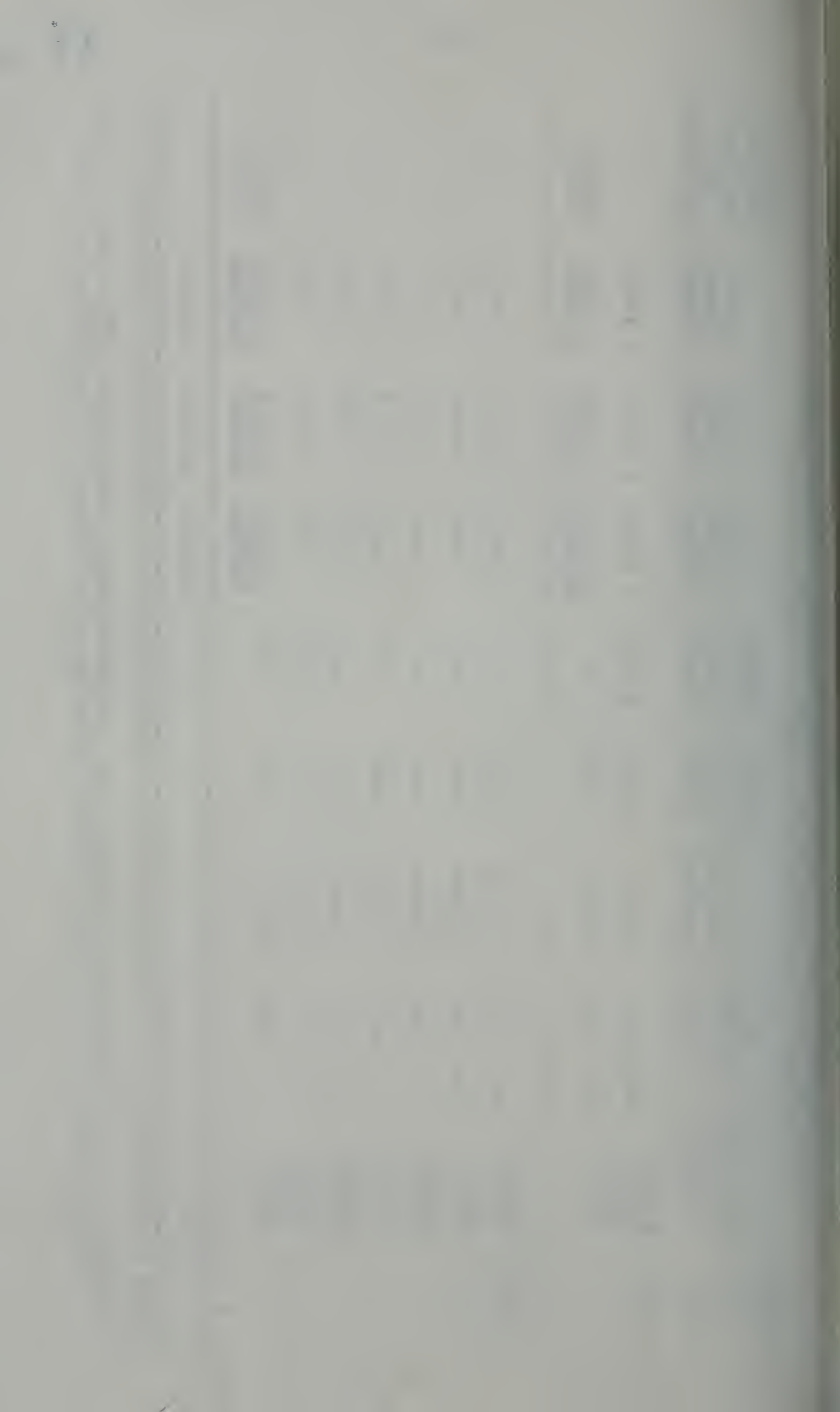
NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4574, Effective April 9, 1927 (Item 4810-K, Thirty-sixth Revised Page...147, Correction No. 3150, Effective Jun. 8, 1943).

BENZOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHER PACIFIC RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

S.P. Co. Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Oct. 1943 P 365145	9/16/43 319745	CATX 14140	10/2/43	58900	\$.88 *	\$ 518.32	\$ 307.74	\$ 210.58	
	9/15/43 319744	CYCX 499	10/2/45	59300	.88 *	521.84 <u>\$1,040.16</u>	309.84 <u>\$ 617.58</u>	212.00 <u>\$ 422.58</u>	21565.8 12/10/43
Nov. 1943 P 375344	10/15/43 319754	CYCX 499	10/26/43	53440	\$.88 *	\$ 523.07	\$ 310.57	\$ 212.50	
	10/5/43 319746	CATX 4040	10/19/43	53960	.88 *	518.85	308.06	210.79	
	10/5/43 319747	" 21374	10/20/43	58900	.88 *	518.32	307.75	210.57	
	10/14/43 319750	" 38796	10/25/43	59880	.88 *	526.94	312.37	214.07	
	10/15/43 319753	" 14140	10/26/43	59280	.88 *	521.66	307.73	213.93	
	10/9/43 319749	" 35877	10/23/43	74680	.88 *	657.18	392.50	264.96	
	10/9/43 319748	" 10907	10/23/43	74360	.88 *	654.37 <u>\$3,920.39</u>	388.52 <u>\$2,327.70</u>	265.85 <u>\$1,592.69</u>	2160801 1/7/44
Totals									
						\$4,960.55	\$2,945.28	\$2,015.27	

*Tariff Reference: PFTB 1-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 871, Effective May 6, 1941).

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4574, Effective April 9, 1927 (Item 4810-K, Thirty-sixth Revised Page...147, Correction No. 3150, Effective Jun. 8, 1943).



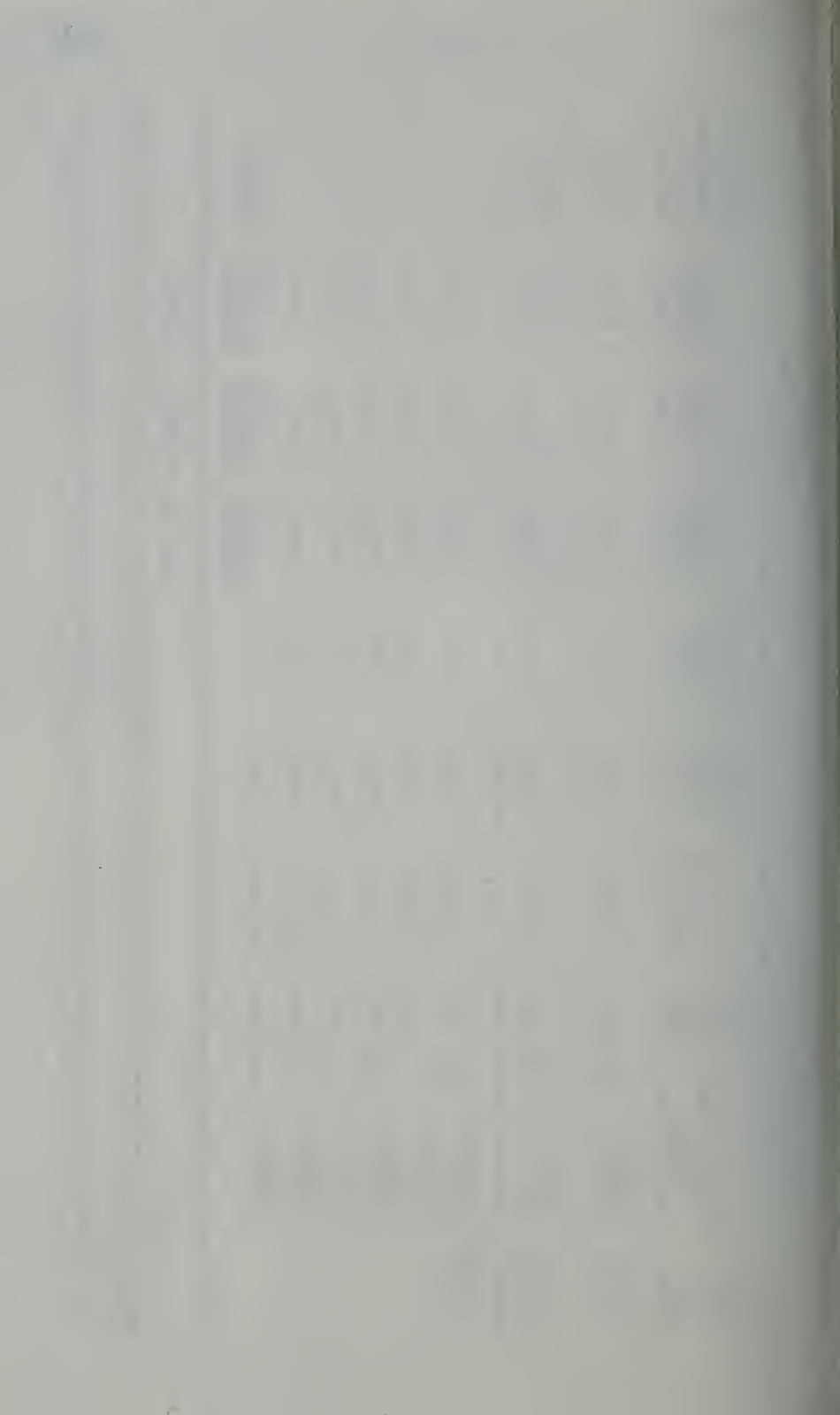
BEACON SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHERN PACIFIC
RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

S.P.Co. Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Nov. 1943 F 376519	10/30/43 319731	GATX 24374	11/13/43	59420	\$.88 *	\$ 522.90	\$ 310.47	\$ 212.43	2160801 1/7/44
Nov. 1943 F 377533	11/2/43 319733	GATX 4040	11/15/43	59320	\$.88 *	\$ 522.02	\$ 309.94	\$ 212.08	2160801 1/7/44
Nov. 1943 F 378665	10/14/43 319731 10/23/43 319759 10/21/43 319753 10/21/43 319757 10/23/43 319750 10/19/43 319756	CDL 838 " 756 GATX 2759 CUX 8974 CUX 1124 GATX 75598	10/30/43 11/3/43 11/2/43 11/2/43 11/3/43 11/4/43	50180 59360 60100 59140 73900 74380	\$.88 * \$.88 * \$.88 * \$.88 * \$.88 * \$.88 *	\$ 529.53 522.37 528.88 520.43 650.32 654.54 33,406.12	\$ 314.43 310.15 314.02 309.00 386.12 388.63 32,022.35	\$ 215.15 212.22 214.86 211.43 264.20 265.91 \$1,383.77	2160801 1/7/44

Totals \$1,451.04 \$2,642.76 \$1,808.28

Tariff Reference: VFTB I-S ICC 1352 July 15, 1940 (Item 4640-B, 3rd Revised Page...243, Correction No. 871, Effective May 6, 1941).

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4574, Effective April 9, 1927 (Item 4810-K, Thirty-sixth Revised Page...147, Correction No. 315C, Effective Jun. 8, 1943).



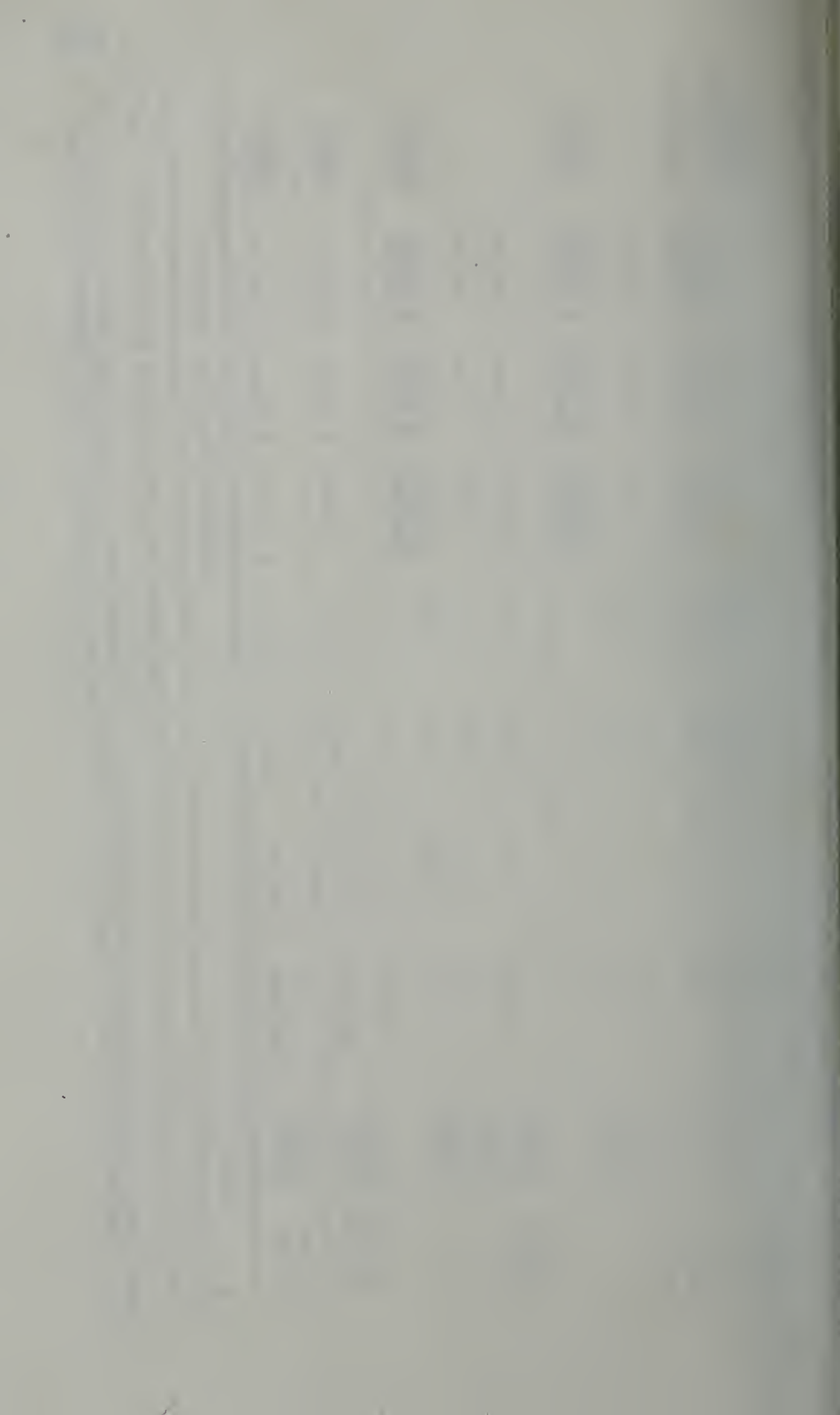
BEVOL SHIPMENTS FROM SEATTLE, WASHINGTON, TO VERNON, CALIFORNIA, VIA NORTHERN PACIFIC RAILWAY COMPANY TO EAST PORTLAND, OREGON, THENCE VIA SOUTHERN PACIFIC COMPANY.

S.P. Co. Bill Date and Number	Bill of Lading Date and Number	Car Initials and Number	Delivered On or About	Weight of Shipment (Pounds)	Applicable Tariff Rate Per Cwt.	Amount Billed (Dollars)	Amount Paid (Dollars)	Balance Claimed (Dollars)	Reference to Settlement Check Number and Date Received
Nov. 19/23 F 378731	10/19/23 319755	GATX 28270	11/2/23	59960	\$.88 *	\$ 527.65	\$ 313.28	\$ 214.37	
	10/14/23 319752	" 11626	11/6/23	77740	.88 *	684.11	406.18	277.93	2161186 1/8/24
						<u>\$1,211.76</u>	<u>\$ 719.46</u>	<u>\$ 492.30</u>	
Dec. 19/23 F 381786	11/15/23 319766	GATX 18553	11/27/23	74315	\$.88 *	\$ 653.97	\$ 383.29	\$ 255.68	
	11/15/23 319765	" 18512	11/27/23	74069	.88 *	651.81	387.00	264.81	
	11/16/23 319767	" 19655	11/29/23	74030	.88 *	651.46	386.80	264.66	2164206 2/1/24
						<u>\$1,957.24</u>	<u>\$1,163.09</u>	<u>\$ 795.15</u>	
Dec. 19/23 F 384078	11/29/23 319769	GATX 27717	12/9/23	73401	\$.88 *	\$ 645.93	\$ 383.51	\$ 252.42	2164206 2/1/24
Dec. 19/23 F 384563	11/27/23 319768	GATX 24374	12/9/23	59216	\$.88 *	\$ 521.10	\$ 309.40	\$ 211.70	2164206 2/1/24
						<u>\$4,336.03</u>	<u>\$2,572.46</u>	<u>\$1,761.57</u>	

Totals

*Tariff Reference: FFB 1-S, ICC 1352 July 15, 1940 (Item 4610-B, 3rd Revised Page...243, Correction No. 871, Effective May 6, 1941).

NOTE: Vernon is within Los Angeles tariff switching limits. See Southern Pacific Company Terminal Tariff No. 230-J, ICC 4574, Effective April 9, 1927 (Item 4310-K, Thirty-sixth Revised Page...147, Correction No. 3150, Effective Jun. 8, 1943).



SUMMARY

Sheet 14

	Amount Billed	Amount Paid	Balance Claimed
Sheet 1	\$ 6,112.14	\$ 3,629.04	\$ 2,483.10
Sheet 2	4,009.98	2,380.88	1,629.10
Sheet 3	3,011.70	1,788.18	1,223.52
Sheet 4	5,436.97	3,228.14	2,208.83
Sheet 5	3,860.99	2,292.43	1,568.56
Sheet 6	4,111.72	2,441.30	1,670.42
Sheet 7	4,626.20	2,746.77	1,879.43
Sheet 8	4,921.37	2,922.02	1,999.35
Sheet 9	3,248.26	1,927.71	1,320.55
Sheet 10	3,649.19	2,167.66	1,481.53
Sheet 11	4,960.55	2,945.28	2,015.27
Sheet 12	4,451.04	2,642.76	1,808.28
Sheet 13	4,336.03	2,574.46	1,761.57
Grand Totals.....	\$56,736.14	\$33,686.63	\$23,049.51

[Endorsed]: Filed July 12, 1944.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Defense Supplies Corporation, a corporation, and answers the complaint on file herein as follows: [22]

FIRST DEFENSE

I.

Defendant alleges that the complaint and Counts One and Two thereof and each of them fail to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

II.

Defendant admits the averments of paragraph I of the complaint, but further alleges that the action arises under Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954; 49 U.S.C. 65) and under the Act of Congress of June 7, 1924 (43 Stat. 486; 10 U.S.C. 1375), and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000).

III.

Defendant admits the averments of paragraph II of the complaint.

IV.

Defendant admits the averments of paragraph III of the complaint, but further alleges that defendant was created as an instrumentality of the United States Government in order to aid the Government in its national defense program, and for the purposes of producing, acquiring, carrying, selling or otherwise dealing in strategic and critical materials as defined by the President, and of purchasing and producing materials and supplies for the manufacture of strategic and critical materials, and any other articles and supplies necessary to the national defense.

V.

Defendant admits the averments of paragraph IV of the [23] complaint, save and except the averments thereof respecting the tariff rates applicable to the transportation of the shipments involved, and

denies that the exhibit annexed to and made a part of the complaint and referred to in paragraph IV thereof shows the applicable tariff rate and reference to the lawfully published and effective tariffs containing the freight rate or rates applicable to the transportation of the shipments involved and conditions in connection there with.

In connection with the foregoing denial and further answering said paragraph IV, defendant alleges that said benzol was motor benzol which was purchased and acquired by defendant from Seattle Gas Company f.o.b. tank cars Seattle, Washington, prior to the transportation thereof as alleged in the complaint, and was owned by and the property of defendant at all of the times therein mentioned; that motor benzol, and the several materials into which said motor benzol was processed and manufactured as hereinafter alleged, were at all of the times mentioned in the complaint and now are defined by the President of the United States as strategic and critical materials; that said motor benzol was so purchased, acquired and caused to be transported by defendant on the recommendation and request of the War Production Board and for the sole and exclusive purpose of establishing and maintaining at Vernon, California, a stock-pile thereof allocated for defense purposes; that said stockpile was necessary to the national defense in order to provide and accumulate supplies of motor benzol to be processed and refined into refined benzol, which was required for use in the manufacture and production of cumene and ethyl-benzine, which in turn were re-

quired for use in the manufacture and production of 100-octane aviation gasoline and of styrene, a component of [24] Buna-S synthetic rubber, which said aviation gasoline and synthetic rubber were and are required and necessary for military and naval uses of the United States, and from and after November, 1943, said motor benzol purchased, acquired and transported as aforesaid was so processed and manufactured; that said benzol was military and naval property of the United States within the meaning of said Section 321 of the Transportation Act of 1940, and said shipments and transportation thereof were movements for military and naval and not for civil use within the meaning of said section; that said shipments were made over railroads which were aided in their construction by grants of land under land grant acts, and the charges for said transportation at the rates and based on the tariffs alleged and referred to in paragraph IV of the complaint were subject to land grant deductions as provided by law.

VI.

Defendant admits the averments of paragraph V of the complaint, but further alleges that the tariffs and rates therein alleged were for transportation for the public at large, and that defendant was and is entitled, as hereinbefore alleged, to land grant deductions from the charges made by plaintiff for the transportation of said benzol, which said charges were the full commercial charges based on said tariffs and rates applicable to the public at large.

VII.

Defendant admits the averments of paragraph VI of the complaint, save and except the averments thereof that the bills presented by plaintiffs to defendant for the transportation charges on said shipments were based upon the lawful and applicable rate or rates and that there is any unpaid balance [25] of charges for said transportation. In this connection defendant alleges that said bills and rates were subject to land grant deductions and allowances as hereinbefore alleged, aggregating the sum of \$23,049.51, being the total amount deducted and withheld by defendant from its payments to plaintiff and being the difference between the total amount of the bills presented by plaintiff to defendant and the payments made by defendant to plaintiff, as alleged in the complaint and shown in the exhibit annexed thereto and made a part thereof; and defendant denies that there is any unpaid balance of charges for said transportation.

VIII.

Defendant denies each and every averment of paragraph VII of the complaint, and further denies that plaintiff is entitled to recover any other amount from defendant, or at all.

IX.

Defendant admits the averments of paragraph VIII of the complaint, but further alleges that the action arises under the Act of Congress of June 7th, 1924 (43 Stat. 486; 10 U.S.C. 1375).

X.

Answering paragraph IX of the complaint, de-

fendant refers to and hereby incorporates by reference as fully as though here repeated, paragraphs III, IV, V, and VI of this Answer, and all of the allegations contained in said paragraphs.

XI.

Defendant admits the averments of paragraph X of the complaint, save and except the averments thereof that the bills presented by plaintiff to defendant were based upon the lawful [26] and applicable rate or rates and that there is any unpaid balance of charges for said transportation. In this connection defendant alleges that said bills and rates were subject to land grant deductions and allowances as hereinbefore alleged, aggregating the sum of \$23,049.51, being the total amount deducted and withheld by defendant from its payments to plaintiff and being the difference between the total amount of the bills presented by plaintiff to defendant and the payments made by defendant to plaintiff, as alleged in the complaint and shown in the exhibit annexed thereto and made a part thereof; and defendant denies that there is any unpaid balance of charges for said transportation.

XII.

Defendant admits the averments of paragraph XI of the complaint.

XIII.

Defendant denies each and every averment of paragraph XII of the complaint, and further denies that plaintiff is entitled to recover any other amount from defendant, or at all.

Wherefore, defendant prays that plaintiff take nothing by its complaint herein and that defendant have judgment for its costs and for such other and further relief as to the court may seem meet and proper.

/s/ THEODORE R. MEYER,
/s/ R. L. MILLER,
/s/ JOSEPH F. HOGAN,
/s/ BROBECK, PHLEGER &
HARRISON,

Attorneys for Defendant. [27]

Copy of the foregoing answer received this 9th day of January, 1945.

C. W. DURBROW,
C. O. AMONETTE,
CHARLES W. BURKETT, Jr.
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 10, 1945. [28]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto by their attorneys, that the following evidentiary facts are true and they and the exhibits hereinafter made a part hereof are to be considered in evidence in this action; provided that both parties shall have the right to offer other and further evidence not inconsistent therewith, and may bring to the attention of the Court any facts of which the Court may take judicial notice. [29]

1. Plaintiff is now, and was during all of the times hereinafter mentioned, a corporation duly created, organized and existing under laws of the State of Kentucky, authorized to do and doing business in the State of California and in other states, and, as such corporation was, during all of said times, engaged as a common carrier by railroad in the transportation of persons and property for hire in interstate commerce over its lines and in participation with other common carriers by railroad in and through various states of the United States.

2. Defendant is now, and was during all of the times hereinafter mentioned, a corporation duly created by the Reconstruction Finance Corporation at the request of the Federal Loan Administrator with the approval of the President, pursuant to authority contained in Section 5d of the Reconstruction Finance Corporation Act, as amended, with its principal office located in the City of Washington, District of Columbia. At all of said times defendant did and now does business and had and now has an agent and representative in the City and County of San Francisco, in the Northern District of California. A certified copy of its charter, dated August 29, 1940, and a certified copy of an amendment thereto, dated February 15, 1941, and an amendment thereto, dated July 9, 1941, were duly filed with the Secretary of the Senate and the Clerk of the House of Representatives, and were published in the Federal Register, as contemplated by 15 U.S.C., Sec. 606b(3). True copies of de-

fendant's charter, as amended, and by-laws, as in force and effect during all of the times herein mentioned, marked Exhibits A and B, respectively, are attached hereto and made a part hereof. At all of the times material to this action the accounts of defendant were not audited, settled, or adjusted by the General Accounting Office of the United States.

3. On April 7, 1942, the Executive Committee of defendant adopted the following resolution: [30]

"Whereas, the War Production Board did on April 2, 1942, by its letter of that date, recommend to this Corporation that it purchase 50,000,000 gallons of motor benzol for the purpose of storing such benzol and creating a stockpile thereof;

"Resolved First, that this Corporation purchase and place in storage not to exceed 50,000,000 gallons of motor benzol at a price not in excess of ten cents per gallon.

"Resolved Second, that the President or any Vice President be and hereby is authorized:

"1. To enter into such agreements, approved by the General Counsel or Counsel designated by him, as may be necessary to carry out the provisions of this resolution and the purchase referred to;

"2. To make (or designate a person or persons to make) such other arrangements as may be deemed necessary or appropriate, including but not limited to transportation, insurance, handling, storage, protection and disposition of such motor benzol.

"Resolved Third, that the Treasurer or an Assistant Treasurer be and hereby is authorized to take such action as may be necessary:

"1. To carry into effect any agreements and arrangements made pursuant to the foregoing authority;

"2. To disburse such funds of the Corporation as are required to be expended pursuant to any such agreements and arrangements;

"3. To make such other disbursements as may be approved by the President or a Vice President."

4. Said resolution was amended by resolution adopted by the Executive Committee of defendant on July 18, 1942, by striking from paragraph 2 in Resolved Second thereof the words "and disposition of such motor benzol," and substituting therefor the following: [31] " , processing and disposition of such motor benzol and by-products resulting therefrom."

5. On September 21, 1942, the Executive Committee of defendant adopted the following resolution, further amending said resolution adopted on April 7, 1942:

"Resolved First, That, in connection with the resolution adopted by this Corporation on April 7, 1942, as amended, authorizing the purchase and storage of not to exceed 50,000,000 gallons of motor benzol at a price not in excess of 10c per gallon, the action heretofore taken whereby:

(a) Contracts were executed for the purchase of motor benzol at prices in excess of 10c per gallon; and

(b) Benzol was purchased containing a percentage of gasoline, the benzol being recoverable, be and hereby is ratified and confirmed.

“Resolved Second, that said resolution adopted by this Corporation on April 7, 1942, as amended, be and hereby is further amended by striking the Resolved First clause thereof and inserting in lieu thereof the following:

“ ‘Resolved First, That this Corporation purchase, store, and arrange for further processing and sale of not to exceed 50,000,000 gallons of motor benzol at a price not in excess of 16c per gallon.’ ”

6. Further resolutions were adopted by the Executive Committee of defendant from time to time, further amending said resolution adopted on April 7, 1942, by increasing the quantity of benzol to be purchased and stored by defendant and for which defendant was to arrange for further processing and sale, and by [32] increasing the prices which defendant was authorized to pay for benzol purchased.

7. The letter of the War Production Board dated April 2, 1942, referred to in the foregoing resolution adopted by the Executive Committee of defendant on April 7, 1942, and the memorandum attached to said letter, were in words and figures as follows:

“War Production Board, Washington, D. C.

April 2, 1942

In Reply Refer To: Room 2001 Tempo “R.”

Mr. W. L. Clayton, Special Assistant to the Secretary, Department of Commerce, 811 Vermont Avenue, Washington, D. C.

Re: Benzene—Stockpile

Dear Will:

Attached is a copy of memorandum dated March

31st from Dr. E. W. Reid, Chief of the Chemicals and Allied Products Branch of the War Production Board, recommending purchase of a stockpile of 50 million gallons of motor grade Benzol.

This office concurs in the recommendation for the reasons outlined in Dr. Reid's memorandum.

If you require any further information on this subject, we shall be glad to furnish it.

Very sincerely,
/s/ W. Y. ELLIOTT, Chief,
Stockpile and Shipping
Branch."

Attachment. [33]

(Memorandum)
"War Production Board
Washington, D. C.

March 31, 1942.

To: Dr. William Y. Elliott.

From: E. W. Reid.

Subject: Stockpile of Benzene.

Source of Supply: Domestic production from by-product coke ovens.

Imports 1941: Negligible.

Expected Imports, 1942: Negligible.

Expected Domestic Production: Estimated current rate 160 million gallons per year. Estimated rate by end of 1943, 180 million gallons per year.

Uses, Present: Manufacture of chemicals, notably phenol and aniline, both of which are essential to the war program. Uses in motor fuel, to the extent of about 100 million gallons per year (this use is non-essential).

Future: Essential uses in the synthetic rubber program for manufacture of styrene and, to a lesser extent, for butadiene, eventually requiring 80 to 100 million gallons per year for the 700,000 ton rubber program; also essential use as an addition to 100 octane gasoline, either as benzol or as a derivative of benzol. This latter use has only recently assumed significance, but may become extensive.

Annual Essential Consumption: 60 million gallons per year at present, becoming by the spring of 1943 the complete production of the country (around 170 to 180 million gallons per year). The demand may well exceed producing capacity, particularly if present plans for use in 100 octane gasoline develop as anticipated.

Control Orders: An order prohibiting the use of benzol as motor fuel is being drafted, and a second is planned which will place benzene under allocation.

Statement of Recommendation: Grades to Be Purchased: Since the synthetic rubber plants will be built to use impure benzol, now marketed under the term motor benzol, and since this grade constitutes two-thirds of present production, the major stockpile should be made up from the ordinary motor grade. This should probably be supplemented by a stockpile of nitration grade benzol if it develops that the capacity to produce nitration grade is in excess of demands.

Suggestions as to the Best Way to Handle Purchases: Purchases should probably be made through Defense Supplies Corporation. The ben-

zol will be released from this stockpile for operation of synthetic rubber plants [35] and perhaps also for incorporation in 100 octane gasoline.

Percentage of Stockpile Recommended for Release to Industry: Probably none.

Percentage of Stockpile Recommended for Permanent Stockpile: Probably none.

Reasons for Recommendations: It seems evident that the essential demand for benzol in 1943 will exceed production. There is a tremendous amount of benzol (100 million gallons per year) now going into motor fuel. It is imperative that this practice be stopped at once so that this benzol will be available for synthetic rubber and aviation gasoline. Currently it cannot be incorporated in large amounts in aviation gasoline because the aircraft equipment, such as leak-proof tanks, has not yet been fully converted to a type which will resist action of benzol blends. This conversion is expected to be effectively completed by July, 1942, at which time considerable benzol can presumably be used in 100 octane fuel.

It is thus obvious that the months immediately ahead of us represent an extremely favorable time for building a considerable stockpile which will be sorely needed in 1943.

For the above stated reasons we recommend that the Defense Supplies Corporation of the R. F. C. purchase at least 50 million gallons of motor grade benzol as quickly as practicable to be allocated for defense purposes. We would emphasize that most of the excess supply for such a stockpile [36] will be produced before August, 1942, before the avia-

tion gasoline and synthetic rubber demands have built up, and that immediate action is therefore imperative.

/s/ E. W. REID,

Chief, Chemicals and Allied
Products Branch."

8. The recommendation in said letter for purchase by defendant of a stockpile of 50,000,000 gallons of motor grade benzol was subsequently increased to 65,000,000 gallons by letter dated June 4, 1943, and memorandum attached thereto dated May 27, 1943, in words and figures as follows:

"War Production Board, Washington, D. C.

June 4, 1943.

In Reply Refer to: Stockpiling and Transportation Division, Room 2650—SSB.

Honorable Jesse Jones, Secretary of Commerce, Department of Commerce, 811 Vermont Ave., N. W., Room 1210, Washington, D. C.

Re: Stockpile Recommendation Benzene (Benzol)

Dear Mr. Jones:

You will find attached a copy of memorandum from Dr. D. P. Morgan, Director of the Chemicals Division, recommending the purchase of an additional 15,000,000 gallons of benzene (benzol). This increases our recommendation of April 2, 1942, to 65,000,000 gallons to be purchased up to December

31, 1943. [37] This office concurs in this recommendation.

Sincerely yours,

/s/ W. Y. ELLIOTT,

Director, Stockpiling and
Transportation Division.

Enclosure''

(Memorandum)

“War Production Board, Washington, D. C.

May 27, 1943.

In Reply Refer to: Chemicals Divisions, Room
1000, Tempo “S” Building.

Dr. W. Y. Elliott, Director, Division of Stockpiling
and Transportation, War Production Board,
Washington, D. C.

Dear Dr. Elliott:

On April 2, 1942, it was recommended that purchase be made of 50,000,000 gallons of domestic benzene to be refined and stockpiled.

Over 40,000,000 gallons of benzene have already been purchased under this arrangement and it now appears that there will be available more than the original 50,000,000 gallons.

Therefore, for the year 1943 the purchase is recommended of an additional 15,000,000 gallons up to December 31, 1943.

Very sincerely yours,

/s/ D. P. MORGAN,

Director, Chemicals Division''

9. On April 20, 1942, the Director of Industry Operations of the War Production Board issued Conservation Order No. M-137 (7 F.R. 2944) relating to the chemical compound known by the name of benzene or by the name benzol, which order took effect immediately upon issuance. Said order was amended June 1, 1942 (7 F.R. 4172), and was further amended July 23, 1943 (8 F.R. 10350). As amended July 23, 1943, the order was entitled "Allocation Order M-137." The said Allocation Order M-137 was revoked June 1, 1944 (9 F.R. 5970), and superseded by General Allocation Order M-300, Schedule 22 issued on said date (9 F.R. 5982).

10. During the years 1942 and 1943, beginning in the month of July, 1942, plaintiff, in participation with other interstate common carriers by railroad, at the request of defendant, transported for and on behalf of defendant from Seattle, Washington, to Los Angeles, California, and from Seattle, Washington, to Vernon, California (Vernon being within the tariff switching limits of Los Angeles), upon Government bills of lading, prepared and furnished by defendant's agent, a number of tank car shipments of motor benzol. On each of said bills of lading Defense Supplies Corporation (Seattle Gas Company) is shown as shipper and consignor, and Defense Supplies Corporation, c/o Wilshire Oil Company, is shown as consignee. Plaintiff, as the final and delivering carrier, made delivery of said shipments in accordance with said bills of lading. The particulars of the transportation service performed, including the routes of movement, the num-

bers of Government bills of lading and dates thereof, identity of cars in which transportation was performed, dates of delivery, and weights of carload shipments transported, are correctly shown in "Exhibit A" attached to and made a part of the complaint.

11. The shipments involved in this suit consisted of 944,032 gallons, more or less, of motor benzol purchased and acquired by defendant from Seattle Gas Company, Seattle, Washington, from time to time during the period from June, 1942, to November, 1943, and at the times of said transportation said motor benzol [39] was owned by and was the property of defendant. Each of said purchases was made by defendant pursuant to allocations by the War Production Board, and to notice of such allocations substantially in the form of the letter and attachment thereto marked Exhibit C, hereto attached and made a part hereof. The first such purchase was made by a telegram from defendant to Seattle Gas Company dated June 27, 1942, a true and complete copy of which, marked Exhibit D, is attached hereto and made a part hereof. The subsequent purchases were evidenced by letters from defendant to said company, with said company's acceptances endorsed thereon. A true and complete copy of a letter from defendant to said company, dated October 19, 1942, and of said company's acceptance thereof, dated October 26, 1942, marked Exhibit E, is attached hereto and made a part hereof. All of the letters from defendant and acceptances by said company covering said subse-

quent purchases were similar in all respects to said Exhibit E, except as to dates, quantity of benzol, and price. Defendant instructed Seattle Gas Company to ship said motor benzol to Wilshire Oil Company, Inc., Vernon (Los Angeles), California, to show defendant as consignor and consignee of these shipments, to use bills of lading therefor furnished by defendant's agent, and to mark on all of said bills of lading "For Military Use." Said instructions were followed by Seattle Gas Company. The various shipments of said benzol, upon arrival at destination, were stored for defendant at the Vernon tank farm of said Wilshire Oil Company, Inc., pursuant to a contract dated May 13, 1942, between defendant and Wilshire Oil Company, Inc., a copy of which said contract, marked Exhibit F is attached hereto and made a part hereof. The first shipment of said motor benzol involved in this suit arrived in said storage on July 28, 1942, and the last on December 9, 1943.

12. Each of the carriers participating in said transportation was at all times herein mentioned a party to and participated [40] in the tariff or tariffs specifying the rate or rates for the transportation of motor benzol from Seattle, Washington, to Los Angeles and Vernon, California. Said tariffs and the rates specified therein were duly published and filed with the Interstate Commerce Commission as required by the provisions of Section 6 of Part I of the Interstate Commerce Act and were in legal effect at the time when the shipments were made. The rate or rates specified in said tariffs for the

transportation of motor benzol from Seattle, Washington, to Los Angeles and Vernon, California, are those shown in "Exhibit A" attached to the complaint in the column headed "Applicable Tariff Rate Per Cwt." Plaintiff based the amount of charges billed defendant for said transportation services on said duly published and filed rate or rates, and the aggregate amount of charges based on said rate or rates for such transportation services was the sum of \$56,736.14.

13. Said shipments were billed and forwarded with charges collect, and plaintiff, being the delivering carrier charged with the duty of collecting the entire freight charges on said shipments, presented to defendant its respective bills therefor aggregating the sum of \$56,736.14 for such transportation charges for said shipments. Defendant, however, claiming the right to make land-grant deductions in amounts aggregating the sum of \$23,049.51, refused to make payments in amounts aggregating the sum of \$56,736.14 for such transportation services, but paid to plaintiff amounts aggregating the sum of \$33,686.63 only, which was the aggregate amount of transportation charges payable by defendant to plaintiff for said transportation services if defendant was entitled to land-grant deductions on the entire quantity of 944,032 gallons of benzol transported. The amounts so paid were accepted by plaintiff under protest as part payments only and plaintiff subsequently and prior to the bringing of this action rendered its bills to defendant for the unpaid balances of said [41] trans-

portation charges claimed by plaintiff in the sum of \$23,049.51, which defendant had refused to pay, but defendant failed and refused and still fails and refuses to pay said unpaid balances or any part hereof. The dates and numbers of plaintiffs bills against defendant, the amounts billed, the amounts paid, and the balances claimed by plaintiff are correctly shown in "Exhibit A" attached to and made a part of the complaint.

14. All carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, participating in the transportation of the shipments heren described, and each of them, and all carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, parties to and participating in any land-grant route or routes with which the route or routes of movement of the said shipments herein described were equalized under agreements with the United States from the standpoint of net charges to the United States for transportation service, and each of them, had, prior to and at the time of said shipments, filed with the Secretary of the Interior of the United States, in the form and manner prescribed by him, releases of all of their, and its, claims against the United States to lands, interests in lands, compensation, or reimbursement on account of lands and interests in lands

which have been granted, claimed to have been granted, or which it was claimed should have been granted to any such carrier or predecessor in interest under any grant to such carrier or predecessor in interest, in full and complete compliance with the provisions and requirements of paragraph (b) of Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. L. 954); Southern Pacific Railroad Company and Central Pacific Railway Company, [42] owners and lessors, severally, of portions of the lines of railroad operated by Southern Pacific Company, and Southern Pacific Land Company, transferee of certain interests of Southern Pacific Railroad Company and Central Pacific Railway Company, and each of them, had, prior to and at the time of said shipments, filed with the Secretary of the Interior of the United States in the form and manner prescribed by him, like releases. Each of such releases so filed was approved by the Secretary of the Interior prior to any of the shipments in question and the performance of the transportation service hereinbefore set forth.

15. Motor benzol is not suitable for use in the manufacture of cumene, ethyl benzene or styrene, processing and treatment of motor benzol being required to produce industrial pure benzol suitable for such use. Defendant entered into a contract with Shell Oil Company, Incorporated, on October 16, 1943, for the treatment and processing of motor benzol, described therein as untreated benzol, and thus produce industrial pure benzol, at the Wilmington refinery of Shell Oil Company, Incorporated,

near Watson, California. A true copy of said contract is attached hereto as Exhibit G and made a part hereof. Under the same conditions and terms as though contained in said contract, said 944,032 gallons, more or less, of motor benzol purchased and acquired by defendant from said Seattle Gas Company, and stored for defendant at the Vernon tank farm of said Wilshire Oil Company, Inc., were treated and processed by said Shell Oil Company, Incorporated.

16. Defendant made and entered into a contract with Wilshire Oil Company, Inc., dated November 16, 1943, and a contract with Richfield Oil Corporation, dated December 3, 1943, for the sale by defendant to said oil companies of industrial pure benzol to be used by said purchasers in the manufacture of cumene. True copies of said contracts are attached hereto as Exhibits H and I, respectively, and made a part hereof. [43]

17. Defendant made and entered into a contract with Rubber Reserve Company, dated November 30, 1943, for the sale by defendant of industrial pure benzol to be used by said company in the manufacture of styrene. A true copy of said contract is hereto attached, marked Exhibit J, and made a part hereof. Rubber Reserve Company is now and was during all of the times herein mentioned, a corporation duly created by Reconstruction Finance Corporation at the request of the Federal Loan Administrator with the approval of the President, pursuant to the authority contained in Section 5d of

the Reconstruction Finance Corporation Act as amended, with its principal office located in the City of Washington, District of Columbia. A certified copy of its charter, dated June 28, 1940, was duly filed with the Secretary of the Senate and the Clerk of the House of Representatives, and was published in the Federal Register as contemplated by 15 U.S.C., Section 606b(3). True copies of the charter and by-laws of said Rubber Reserve Company as in force and effect during all of the times herein mentioned, marked Exhibits K and L, respectively, are attached hereto and made a part hereof. At all times material to this action the accounts of Rubber Reserve Company were not audited, settled, or adjusted by the General Accounting Office of the United States.

18. Defendant sold and delivered to said Wilshire Oil Company, Inc., Richfield Oil Corporation, and Rubber Reserve Company, commencing in November, 1943, and continuing through August, 1944, industrial pure benzol processed and produced as aforesaid from said 944,032 gallons of motor benzol. Said sales were made pursuant to allocations by the War Production Board and to recommendations by the Petroleum Administration for War as to the benzol to be used in the manufacture of cumene, and by the Office of Rubber Director as to the benzol to be used in the manufacture of styrene. Of said industrial pure benzol 40.56% was sold to and delivered to Wilshire Oil Company, Inc., and Richfield Oil Corporation [44] under said contracts dated November 16, 1943, and December 3, 1943 (Exhibits H

and I hereto), for use in the manufacture of cumene. The balance of said industrial pure benzol (59.44%) was sold and delivered to Rubber Reserve Company under said contract dated November 30, 1943 (Exhibit J hereto) for use in the manufacture of styrene.

19. The said Wilshire Oil Company, Inc., and Richfield Oil Corporation manufactured cumene from the industrial pure benzol sold to them by combining said benzol with propylene to produce by chemical reaction cumene.

20. Pursuant to request of the Petroleum Administration for War, the War Department and the Navy Department, defendant entered into contracts to purchase the production of 100 octane aviation gasoline manufactured by various refineries, including Wilshire Oil Company, Inc., and Richfield Oil Corporation. The contracts entered into by defendant with Wilshire and Richfield, as in force and effect during the times herein mentioned, were dated respectively December 20, 1943, and February 20, 1943, and true and complete copies of said contracts, except the exhibits thereto, marked Exhibits M and N, respectively, are attached hereto and made a part hereof.

21. Styrene is produced from ethyl benzene by chemical reaction in the presence of a catalyst. Ethyl benzene is produced by combining benzol with ethylene by chemical reaction. Rubber Reserve Company first produced ethyl benzene from the industrial pure benzol sold to said company by defendant. With that portion or quantity of ethyl benzene produced from

23.06% of the industrial pure benzol processed and produced as aforesaid from said 944,032 gallons of motor benzol, Rubber Reserve Company produced styrene. Pursuant to allocations by the Office of Rubber Director the styrene so produced was sold by Rubber Reserve Company to rubber companies engaged and for use in the production of synthetic [45] rubber. Said synthetic rubber was produced by combining through chemical reaction styrene and butadiene in the presence of a catalyst. Said rubber companies either used the synthetic rubber so produced to manufacture rubber products, or sold it to other companies for the manufacture of rubber products. 42% of the rubber products manufactured as aforesaid was sold to the Army and Navy for their uses and 58% of said rubber products was sold for civilian uses pursuant to allocations by the War Production Board. 9.66% of motor benzol involved in this action was used in the production of rubber products sold to the Army and Navy for their uses, and 13.4% of the motor benzol involved in this action was used in the production of the rubber products sold for such civilian uses.

22. The remainder of the ethyl benzene produced by Rubber Reserve Company, that is, that portion or quantity made from 36.38% of the industrial pure benzol processed and produced as aforesaid from 944,032 gallons of motor benzol was sold by Rubber Reserve Company, at the request of the Petroleum Administration for War, to refineries engaged in producing 100 octane aviation gasoline for sale to defendant under contracts similar to Exhibits M

and N hereto, to be used by said refineries in the manufacture of said gasoline. Said sales were evidenced by letter agreements in the form attached hereto, marked Exhibit O, and made a part hereof.

23. Cumene and ethyl benzene are components of 100 octane aviation gasoline by blending operations which comprise a physical mixture without chemical change. During all of the times herein mentioned subsequent to December 2, 1942, the manufacture, use, and disposition of cumene and ethyl benzene have been under the control and administration of the Petroleum Administration for War. Pursuant to allocations by said Administration, the cumene manufactured by Wilshire Oil Company, Inc., and [46] Richfield Oil Corporation from the benzol sold to them by defendant as aforesaid, was used by said companies in the manufacture of 100 octane aviation gasoline produced by said companies and sold to defendant in accordance with said contracts dated December 20, 1943, and February 20, 1943 (Exhibits M and N hereto).

24. The 100 octane aviation gasoline produced by Wilshire Oil Company, Inc., and Richfield Oil Corporation by blending with cumene manufactured by said companies from benzol purchased by them from defendant as aforesaid was purchased by defendant from said companies pursuant to said contracts dated December 20, 1943, and February 20, 1943 (Exhibits M and N hereto). The 100 octane aviation gasoline produced by other refineries by blending with ethyl benzene manufactured by Rubber Reserve

Company from the benzol so purchased by said company from defendant was likewise purchased by defendant from said refineries pursuant to contracts similar to said Exhibits M and N.

25. The 100 octane aviation gasoline so purchased by defendant was sold by defendant to the Army and Navy pursuant to a contract executed as of May 20, 1943, between the War Department, the Navy Department, the Petroleum Administration for War, and defendant, a true and complete copy of said contract, except the exhibits thereto, marked Exhibit P, is attached hereto and made a part hereof. A true and complete copy of the contract of December 19, 1942 (referred to in said contract of May 20, 1943—Exhibit P), except the exhibits thereto, marked Exhibit Q, is attached hereto and made a part hereof. The contract of May 20 1943 (Exhibit P), was modified and extended by the contract of July 1, 1944, a true and complete copy of which, except certain [47] provisions thereof deemed not material, marked Exhibit R, is attached hereto and made a part hereof.

Dated July 2, 1945.

/s/ C. O. AMONETTE,

/s/ CHARLES W. BURKETT, Jr.,

Attorneys for Plaintiff.

/s/ THEODORE R. MEYER,

/s/ R. L. MILLER,

/s/ JOSEPH F. HOGAN,

/s/ BROBECK, PHLEGER &

HARRISON,

Attorneys for Defendant. [48]

EXHIBIT A
CHARTER OF DEFENSE SUPPLIES
CORPORATION

As Amended on February 15, 1941, and
July 9, 1941

In order to aid the Government of the United States in its national-defense program, Reconstruction Finance Corporation hereby declares:

First, That pursuant to the authority contained in Section 5d of the Reconstruction Finance Corporation Act, as amended by Act of Congress approved June 25, 1940, at the request of the Federal Loan Administrator with the approval of The President, there has been created a corporation under the name of Defense Supplies Corporation (hereinafter referred to as the "Corporation").

Second, That the location of the principal office of the Corporation shall be in the City of Washington, District of Columbia.

Third, the objects, purposes and powers of the Corporation shall be:

(a) To produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President;

(b) To purchase and lease land; purchase, lease, build, and expand plants; purchase and produce equipment, facilities, machinery, materials, and supplies for the manufacture of strategic and critical materials, arms, ammunition, and implements of

war, any other articles, equipment, facilities, and supplies necessary to the national defense, and such other articles, equipment, supplies, and materials as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection therewith;

(c) To lease, sell, or otherwise dispose of such land, plants, facilities, and machinery to others to engage in such manufacture;

(d) To engage in the manufacture of arms, ammunition, and implements of war;

(e) To produce, lease, purchase, or otherwise acquire railroad equipment (including rolling stock), and commercial aircraft, and parts, equipment, facilities and supplies necessary in connection with such railroad equipment and aircraft, and to lease, sell, or otherwise dispose of the same;

(f) To purchase, lease, build, expand, or otherwise acquire facilities for the training of aviators and to operate or lease, sell, or otherwise dispose of such facilities to others to engage in such training; and [50]

(g) To take such other actions as the President and the Federal Loan Administrator may deem necessary to expedite the national defense program, but the amount outstanding at any one time for carrying out this subsection (g) shall not exceed \$200,000,000.

The Corporation shall have power and authority to do and perform all acts and things whatsoever

which are necessary, suitable, convenient or proper in connection with or incidental to the foregoing objects, purposes, and powers, including, but without limitation, the power to lease, purchase, or otherwise acquire, and to lease, sell or otherwise dispose of, and to deal in, manage and control, transportation facilities in and between the other American countries of the Western Hemisphere and the United States and to otherwise develop such facilities and equipment incidental thereto in order to facilitate trade between those countries and the United States and for other purposes affecting the national defense, the power to borrow and hypothecate, to lend money, to adopt and use a corporate seal, to make contracts, to acquire, hold and dispose of real and personal property, and to sue and be sued in any court of competent jurisdiction.

Fourth, the Corporation including its franchise, its capital, reserves, surplus, and income shall be exempt from all taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) now or hereafter imposed by the United States, or any territory, dependency or possession thereof, or by any State, County, municipality or local taxing authority, except that any real property (or buildings which are considered by the laws of any State to be personal property for taxation purposes) of the Corporation shall be subject to State, territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed.

Fifth, That the Corporation shall be an instrumentality of the United States Government, shall be entitled to the free use of the United States mails, and shall in all other respects be possessed of the privileges and immunities that are conferred upon the Reconstruction Finance Corporation under the Reconstruction Finance Corporation Act, as amended.

Sixth, That the total authorized capital stock of the Corporation shall be Five Million Dollars (\$5,000,000), of which One Million Dollars (\$1,000,000) shall be paid in immediately, and the balance as called. Such stock shall be of one class, shall have a par value of \$100 per share, and shall be issued for cash only. Reconstruction Finance Corporation shall subscribe for all of the capital stock of the Corporation and such stock shall not be transferable.

Seventh, That the Corporation shall have existence until dissolved by Reconstruction Finance Corporation or by Act of Congress.

Eighth, That the stockholder shall not be liable for the debts, contracts, or engagements of the Corporation except to the extent of unpaid stock subscriptions. [51]

Ninth, That the affairs and business of the Corporation shall be managed by a board of directors who shall be appointed by Reconstruction Finance Corporation pursuant to the provisions of this Charter and the By-Laws of the Corporation.

Tenth, That this Charter and the By-Laws may

be amended at any time by Reconstruction Finance Corporation.

In Witness Whereof, Reconstruction Finance Corporation has caused this Charter to be signed by its executive officer, Chairman of its Board of Directors, attested by its Secretary, and has caused its seal to be hereunto affixed this day of 194 . . .

RECONSTRUCTION FINANCE
CORPORATION,

By, Chairman.

Attest:, Secretary.

EXHIBIT B

DEFENSE SUPPLIES CORPORATION
BY-LAWS

OFFICES

1. The principal office shall be in the City of Washington, District of Columbia. The Corporation shall also have branch offices at such other places as the Board of Directors may from time to time designate.

SEAL

2. There is impressed below the official seal which is hereby adopted for the Corporation.

BOARD OF DIRECTORS

3. The directors shall be not less than five nor more than ten in number, as Reconstruction Finance Corporation may provide. The directors shall be appointed by Reconstruction Finance Corporation.

Each director will hold office until the thirty-first day of December of the year in or for which appointed and until his successor shall be duly appointed and qualified.

MEETINGS OF THE BOARD

4. Regular meetings of the directors shall be held at such time and place as the directors may prescribe. Special meetings may be called by the President or Secretary. At any meeting of the Board of Directors, a majority of the duly appointed and qualified directors shall constitute a quorum for the transaction of any business that may come before the meeting.

COMMITTEES OF THE DIRECTORS

5. The Board of Directors shall select from its members an executive committee which shall have, possess and may exercise all of the power and authority of the Board of Directors at such [53] times as the Board of Directors is not in session. The Board of Directors may create such additional committees and confer upon them such duties and powers as it may deem advisable.

COMPENSATION OF DIRECTORS

6. The directors of the Corporation shall receive no fees or honorarium for attendance at meetings but shall be entitled to be reimbursed in accordance with the Standardized Government Travel Regulations, as amended, for travel expenses incurred in attending meetings of the Board of Directors and meetings of the committees of which they are mem-

bers, and any other travel expenses incurred by them on official business.

OFFICERS

7. The officers of the Corporation, who shall be appointed by the Board of Directors, shall be: a Chairman of the Board of Directors, a president, one or more vice-presidents, a secretary, a treasurer, a general counsel, and such other officers and agents as the Board of Directors may deem advisable. The president shall be a director. The salaries and compensation of all officers, agents and employees shall be fixed by the Board of Directors and paid by the Reconstruction Finance Corporation and reimbursed by the Corporation. Any officer, agent or employee may be removed by the Board of Directors at any time, with or without cause.

CHAIRMAN OF THE BOARD

8. The chairman of the Board of Directors shall have general supervision over the business of the Corporation and shall preside at all meetings of the Board of Directors.

PRESIDENT

9. The president shall be the chief executive officer of the Corporation and in the absence of the Chairman of the Board, shall preside at all meetings of the directors. Unless otherwise provided by the Board of Directors, all contracts and other documents which the Corporation may be required to execute in the conduct of its business shall be signed by the President.

VICE-PRESIDENT

10. In the absence or disability of the president, the vice-president (or vice-presidents, in the order of their seniority if more than one) shall perform the duties and execute the powers of the president. They shall perform such other duties as the Board of Directors may prescribe.

SECRETARY

11. The Secretary shall attend all meetings of the Board of Directors and Executive Committee and record the minutes [54] of all such meetings. He shall give, or cause to be given notice of all meetings; shall perform such duties as may be prescribed by the Board of Directors or the Executive Committee, and all other duties incident of the office of Secretary. He shall keep in safe custody the seal of the Corporation, and shall affix the same to any instrument requiring it. When so affixed, the seal shall be attested by the signature of the Secretary.

TREASURER

12. The treasurer shall have the custody of the corporate funds and securities and shall keep a full and accurate account of all financial transactions of the Corporation, in form prescribed or approved by Reconstruction Finance Corporation, and shall deposit with Reconstruction Finance Corporation all funds for the account of the Corporation or in such other depositories as may be designated or approved for the purpose by Reconstruction Finance Corporation. He shall disburse the funds of the Corporation pursuant to the authority of the Board

of Directors of the Corporation, or Executive Committee, and shall render to the Board of Directors or Executive Committee of the Corporation, whenever so required, an account of all his transactions as Treasurer and of the financial condition of Corporation. He shall, if so required by the Corporation, give a bond in a form and sum satisfactory to the Corporation and Reconstruction Finance Corporation.

GENERAL COUNSEL

13. The general counsel shall be the chief consulting officer in all legal matters and will supervise such matters for the Corporation.

FISCAL YEAR

14. The fiscal year shall end on the thirty-first day of December in each year.

OATH OF OFFICE

15. All directors, and officers (and other agents or employees of the Corporation, when so required by the Board of Directors or Executive Committee) shall subscribe to the oath of office prescribed by Section 1757, Revised Statutes of the United States.

CHECKS

16. All checks and drafts for authorized disbursements issued by the Corporation shall be signed by the Treasurer and shall be countersigned by the Secretary. The Board of Directors may by resolution designate other officers or directors to sign or countersign checks, drafts, notes or other documents on behalf [55] of the Corporation. Reconstruction Finance Corporation at the request of the Board of Directors of the Corporation shall

certify to the Treasurer of the United States the names of the incumbents of all offices, the holders whereof have such signatory powers.

STOCK CERTIFICATES

17. The stock certificates or receipts for payments by Reconstruction Finance Corporation, for or on account of the stock subscribed, shall be signed by the president or a vice-president and by the secretary of the Corporation.

EXPENSES

18. All expenses incurred in connection with the operation of the Corporation shall be supervised and paid in such manner as the Board of Directors or Executive Committee may from time to time prescribe.

NOTICES

19. Whenever under the provisions of these By-Laws any notice is required to be given, it shall not be construed to mean personal notice, but such notice may be given by mail, telephone or telegraph. Any requirement as to notice may be waived in writing by the party entitled thereto.

AMENDMENTS

20. These By-Laws may be altered or amended or repealed by the Board of Directors of Reconstruction Finance Corporation at any meeting by such Board. [56]

EXHIBIT C

War Production Board, Washington, D. C.

February 3, 1943.

In Reply Refer to Room 1519, Temporary "S."
Mr. Stuart K. Barnes, Vice President, Defense Sup-
plies Corporation, Room 1003 Lafayette Bldg., 811
Vermont Avenue, Washington, D. C.

Attention: Mr. C. A. Jostes

Gentlemen:

We are enclosing herewith a list covering the al-
location of benzol for February delivery to the De-
fense Supplies Corporation's stockpile.

Very truly yours,

/s/ D. C. ROSS,

Coal Tar Products Unit

CC: Mr. Frost [57]

February 2, 1943

BENZOL—FEBRUARY DELIVERY (1943)

Allocations to D. S. C. Stockpile

Producer	Plant	Pure	Motor	Destination
American Rolling Mill Co. Barrett Div.	Hamilton, Ohio	150,000		Lemont, Ill.
Allied Chemical & Dye Corp. Colo. Fuel & Iron Corp.	Frankford, Pa. Minnequa, Colo.	10,000 90,000		Unknown c/o Wilshire Oil Company, Vernon, Calif.
International Harvester Co. Michigan Alkali Division	So. Chicago, Ill. Wyandotte, Mich.	30,000 40,000		Lemont, Ill. Lemont, Ill.
Sloss Sheffield Steel & Iron Co. Woodward Iron Company	No. Birmingham, Ala. Woodward, Ala.	20,000 30,000		Unknown Unknown
Bethlehem Steel Company Bethlehem Steel Company	Johnstown, Pa. Sparrows Pt., Md.	400,000 650,000		Hays, Pa. Baltimore, Md.
Brooklyn Union Gas Co. Connecticut Coke Company	Brooklyn, N. Y. New Haven, Conn.	230,000 110,000		Unknown Carteret, N. J.
Eastern Gas & Fuel Assoc. Hudson Valley Fuel Corp.	Everett, Mass. Troy, N. Y.	200,000 140,000		Unknown c/o Std. Oil Co. of N. J., Bay- way, N. J.
Koppers Company Philadelphia Coke Company	St. Paul, Minn. Philadelphia, Pa.	60,000 120,000		Lemont, Ill. c/o Sinclair Refining Co., Mar- cus Hook, Pa.

Benzol—February Delivery (1943)—(Continued)

Producer	Plant	Pure	Motor	Destination
Pittsburgh Coke & Iron Co.	Pittsburgh, Pa.		150,000	Unknown
Pittsburgh Coke & Iron Co.	Pittsburgh, Pa.	150,000 (1°)		c/o Atlantic Refining Co., Pt. Breeze, Philadelphia, Pa.
Crucible Steel Co. of Amer.	Midland, Pa.		160,000	Unknown
Crucible Steel Co. of Amer.	Midland, Pa.	30,000 (2°)		c/o Atlantic Refining Co., Pt. Breeze, Phila., Pa.
Rainey-Wood Coke Company	Swedeland, Pa.		110,000	Marcus Hook, Pa.
Republic Steel Corporation	Warren, Ohio		70,000	Hays, Pa.
Republic Steel Corporation	Thomas, Ala.		60,000	Port Birmingham, Ala.
Seattle Gas Company	Seattle, Wash.		68,000	c/o Wilshire Oil Co., Los Angeles, Calif.
Tennessee Products Corp.	Chattanooga, Tenn.		20,000	c/o Gulf Refg. Co., Port Birmingham, Ala.
U.S.S.-Columbia Steel Co.	Provo, Utah		70,000	Unknown
U.S.S.-Tenn. Coal, Iron & R.R. Co.	Fairfield, Ala.		30,000	Unknown
			<hr/>	
			320,000	2,888,000=3,208,000

EXHIBIT D

Defense Supplies Corporation

Washington 25, D. C.

Telegram

James F. Pollard, President, Seattle Gas Company,
Seattle, Washington. June 27, 1942

We Accept Your Offer Two Thousand Barrels Motor Benzol at Thirteen Cents Per Gallon F.O.B. Your Storage Seattle. We Will Purchase Subsequent Production at Twelve Cents Per Gallon F.O.B. Seattle. Ship to Defense Supplies Corporation Care of Wilshire Oil Company, Vernon Tank Farm, Los Angeles, California. Please Investigate if They Can Receive Material From Tanker. Prepay Freight for Our Account. Send Shipping Documents and Invoices to Hector C. Haight, Agent Defense Supplies Corporation, 316 Bendix Building, Twelfth and Maple Streets, Los Angeles, California, One Copy to This Office. Send Us Air Mail Specifications of Your Product. Letter Follows.

/s/ JOHN D. GOODLOE,

CAJ:KC

Executive Vice President.

EXHIBIT E

In reply refer to SRD-6

October 19, 1942

Mr. James F. Pollard, Seattle Gas Company, 1511
Fourth Avenue, Seattle, Washington.

Contract No. 15-P-73

Dear Sir:

Reference is made to our telegram of October 13, in which we agreed to purchase a specified quantity of Motor Benzol in order to relieve congestion in your storage. The following summary of the transaction is submitted for your verification:

1. We will purchase approximately 30,000 gallons of Motor Benzol at a price of 13c per gallon, f.o.b. cars at your plant at Seattle, Washington.

2. You will ship this material via Union Pacific Railroad to the Wilshire Oil Company, Inc., at Vernon, California, showing this corporation as the consignee and consignor, using Government Bills of Lading to be furnished by our Agent for this purpose. You will mark these bills of lading in the following manner:

“For Military Use”

3. It is understood that this purchase is primarily for the purpose of relieving a critical storage congestion at your plant, and is not to be considered as a basis for future purchases at this price.

4. You will forward the original and one copy of the covering invoices, and bills of lading to our Agent, Mr. Hector C. Haight, 3rd floor, Pacific Mutual Building, 523 W. 6th Street, Los Angeles,

California, with one copy of each of these documents to this office.

If the foregoing meets with your approval, we would appreciate your acknowledging your acceptance by signing three copies of this letter. Two copies should be forwarded to Mr. Haight, with one copy to this office.

Very truly yours,

/s/ STUART K. BARNES,

Vice President.

JEJ:aa—Enclosures.

Accepted Oct. 26, 1942. James F. Pollard, Pres.,
Seattle Gas Company. [61]

EXHIBIT F

BENZOL STORAGE CONTRACT

This Contract, made and entered into this 13th day of May, 1942, by and between Defense Supplies Corporation, a corporation created by Reconstruction Finance Corporation pursuant to Section 5(d) of the Reconstruction Finance Corporation Act as amended (hereinafter referred to as "Supplies"), and Wilshire Oil Company, Inc., a California corporation, with offices in Los Angeles, California, (hereinafter referred to as "Tank Owner");

Witnesseth:

Whereas, Supplies is engaged in purchasing motor benzol from manufacturers thereof who are unable to dispose of such benzol for uses permissible under Order M-137 of the War Production Board, issued April 20, 1942, and is desirous of storing

such benzol until such time as it may be allocated to various consumers thereof by the War Production Board; and

Whereas, Tank Owner has available for storage of benzol approximately 80,000 barrels of tankage at its Vernon tank farm suitable for the storage of benzol, and is willing to make such tankage available to Supplies for the storage of benzol on the terms and conditions hereinafter set forth:

Now, Therefore, in consideration of the mutual covenants herein contained it is agreed by and between the parties hereto as follows:

1. Receipt of Shipments.

Tank Owner shall receive shipments of benzol from motor, rail and barge-line carriers, but only if Tank Owner has facilities for receiving from tank trucks, tank cars and/or barges, or installs such facilities at the request and cost of Supplies. Tank Owner shall keep his tanks, pumps and lines clean [62] and free from materials which will contaminate motor benzol. Tank Owner shall measure and notify Supplies of the exact volume in gallons of each shipment received and if so requested, will abstract and hold for Supplies a sample thereof suitable for analysis. Tank Owner shall, promptly after the receipt of each shipment, execute and deliver to Supplies its certificate reciting the receipt of the relative shipment, the volume thereof in gallons, name of shipper, and description and location of the tank where the benzol is stored, together with a recitation that such benzol was received and is stored for Supplies.

2. Risk of Loss.

Tank Owner shall be under no obligation with respect to benzol stored except to exercise ordinary care in such storing, and any insurance on the benzol required by Supplies shall be carried by Supplies for its own account. Tank Owner shall not be chargeable with shrinkage losses due to evaporation. Any taxes imposed on stored benzol shall be for the account of Supplies.

3. Storage Charges.

Supplies shall pay to Tank Owner storage charges or tank rental, the loading in-and-out and transfer charges provided for in Appendix A annexed hereto and made a part hereof. Tank Owner shall, on or before the tenth day of each month during the storage period, submit to Supplies an itemized statement of charges due for the preceding month, and Supplies shall pay the amount of said charges promptly and not later than the twentieth day of such month.

4. Shipping From Storage.

Upon receipt of shipping instructions from Supplies, Tank Owner shall load and ship in tank cars, tank trucks or barges, if Tank Owner shall have facilities therefor, to such consignees as Supplies may designate. It is recognized by the parties hereto [63] that motor benzol solidifies at approximately 30° Fahrenheit and is not susceptible of being loaded out of tanks without special heating facilities being provided. Should Supplies require the handling of the benzol during periods when the heating thereof is necessary, Tank Owner shall,

if such facilities are not available to it and if so requested by Supplies, install the requisite heating facilities, such installation to be at the sole cost and expense of Supplies.

4a. On all shipments of benzol from Tank Owner's storage to any point within one hundred (100) miles of said storage, Supplies shall notify Tank Owner prior to making any such shipment, whereupon Tank Owner shall have the option to transport said Benzol by tank truck and/or trailer or provide such transportation facilities and Supplies will pay Tank Owner for such transportation at the rates prescribed by the Railroad Commission of the State of California.

5. Records.

Tank Owner shall keep separate books and records which will clearly reflect all of the transactions made by it under and pursuant to this contract. From time to time, upon request of Supplies, Tank Owner will furnish Supplies with such additional information as the latter may request in connection with carrying out the provisions of this storage contract. Tank Owner will permit representatives of Supplies, during the usual hours of business, to audit or examine such books, records and accounts as may be pertinent to the purpose of auditing and verifying reports furnished pursuant to this contract and the performance by Tank Owner of its terms.

5a. Term.

This contract shall continue in force until cancelled by either party upon ninety (90) days' no-

tice given to the other [64] party in writing. Any notice to Supplies, under this paragraph, shall be deemed sufficiently served when deposited in the United States mail, postage prepaid, addressed to Supplies, Washington, D. C. Any notice to Tank Owner under this paragraph, shall be deemed sufficiently served when deposited in the United States mail, postage prepaid, addressed to Tank Owner at 1206 Maple Avenue, Los Angeles, California.

6. Miscellaneous Provisions.

In carrying out this contract Tank Owner agrees to comply with and give all stipulations and representations required by applicable Federal Laws, and further agrees to require such compliance, representations and stipulations with respect to any contract entered into by it with others, incidental to or in connection with this contract, as may be required by applicable Federal laws; notwithstanding the generality of the foregoing, Tank Owner further agrees that in the performance of this contract it will not discriminate against any worker because of race, creed, color or national origin. Tank Owner is a corporation and this contract is made with it for its general benefit and no Member of, or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom in violation of the law of the United States covering such matters.

In Witness Whereof, the parties have caused this

contract to be executed as of the day and year first above written.

DEFENSE SUPPLIES
CORPORATION.

By /s/ GEO. H. HILL, JR.,
Vice President.

WILSHIRE OIL COMPANY,
INC.

By /s/ M. A. MACHRIS,
Vice President.

Attest:

/s/ DUDLEY H. DIGGES,
Acting Secretary, Defense
Supplies Corporation. [65]

APPENDIX A

Wilshire Oil Company, Inc.
(Vernon Tank Farm Tankage)

The storage charge for the benzol stored pursuant to the within contract shall be one cent per barrel of 42 U.S. gallons per month, fractional months pro rata.

For loading out of tank cars, Tank Owner shall charge Supplies two cents per barrel of 42 U. S. gallons.

For loading into tank cars, Tank Owner shall charge Supplies two cents per barrel of 42 U. S. gallons. [66]

EXHIBIT G
AGREEMENT FOR THE RERUNNING
OF BENZOL

This Agreement, made and entered into as of the 16th day of October, 1943, by and between Defense Supplies Corporation, Washington, D. C., a corporation organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, as amended, hereinafter referred to as "Corporation," and Shell Oil Company, Incorporated, a Virginia corporation, with offices located at 100 Bush Street, San Francisco, California, hereinafter referred to as "Shell,"

Witnesseth:

Whereas, Corporation and Shell have entered into an agreement dated June 1, 1943, providing for the storage of untreated benzol owned by Corporation and stored in storage facilities owned by Shell and located at Shell's Wilmington Refinery near Watson, California; and

Whereas, Corporation desires to have Shell treat and rerun said untreated benzol and handle the resultant products, and Shell is agreeable to doing so, and it is desired to set forth the agreement between the parties with respect thereto; and

Whereas, Shell does not now have installed on the premises all of the facilities necessary to provide this service and it is desired to set forth the agreement of the parties with regard to the installation of and paymnt for the facilities which are required;

Now, Therefore, in consideration of the premises

Exhibit G—(Continued)

and the covenants herein contained, it is agreed by and between the parties hereto as follows: [67]

1. Construction of and Payment for the Treating Facilities: Shell shall install on its said refinery premises redistillation equipment and truck loading equipment, and make whatever changes in piping are needed to provide for the transfer to the treating and redistillation facilities of said untreated benzol and the loading of such treated benzol into shipping facilities. The cost of making this installation is estimated to be as follows:

Column and heat exchangers	\$10,000.00
Pumping	9,400.00
Piping pumps and miscellaneous equipment	7,500.00
	21,850.00
Installation cost	19,750.00
	<hr/>
	\$41,250.00
Total.....	\$37,250.00

Upon the completion of the installation, Shell shall furnish Corporation a statement of all costs incurred in connection therewith, and Corporation shall reimburse Shell therefor as follows:

Corporation shall pay Shell each month for and during one hundred and twenty (120) months from the date of completion thereof, 1/120th of said costs.

If, upon the expiration or sooner termination of this contract, Corporation has not reimbursed Shell for the entire cost of this installation, Corporation

Exhibit G—(Continued)

shall forthwith pay to Shell an amount of money equal to the total cost of the installation less the aggregate of the amortization payments received by Shell from Corporation as provided for above and also less the value of the facilities involved at the time of such expiration or sooner termination of the contract as such value shall be determined by [68] agreement of the parties and in the event the parties fail to agree, then as determined by arbitration.

2. Use of Existing Facilities: It shall be necessary for Shell to use from time to time in connection with the treatment and rerunning of untreated benzol hereunder, the following described tanks presently situated on Shell's refinery premises:

	bbls. capacity
1. Agitator rundown tank for acid treatment.....	1,200
	2,600
2. Distillation feed tanks (850) bbls. each).....	1,700
1,300	
	1,100
1. Distillation tops and bottoms tank (850 bbls.).....	850
1,100	
1. Dist. bottoms tank (1,100 bbls.).....	1,100
	2,200
2. Finished C-2 quality benzol tanks (850 bbls. each)....	1,700
1,100	
	8,200
Total.....	5,450

In addition, Shell may use such additional tanks as may be necessary to maintain capacity operation, but in no case may Shell be required to use more than the above tankage.

Exhibit G—(Continued)

Corporation shall pay Shell during the term hereof a monthly rental of 0.5c per barrel tank capacity for all such tankage as may be used by Shell for treating and rerunning untreated benzol.

3. Treatment of Untreated Benzol: Shell shall accept from Corporation at the outlet of the tanks at Wilmington referred to in the benzol storage agreement wherein Corporation's untreated benzol is stored, whatever benzol Corporation shall tender to Shell for treatment and rerunning hereunder. Shell shall not be obligated to accept any quantity or quantities greater than the through-put capacity of the treating facilities provided for such purpose [69] as contemplated and provided for herein, and Shell shall not be obligated to treat and rerun hereunder more than 5,000,000 gallons of untreated benzol during any calendar year or more than 500,000 gallons during any calendar month, or any untreated benzol which will not yield C-2 quality benzol by the acid treatment and redistillation contemplated hereby.

Such benzol shall be treated and rerun by Shell, and the finished benzol shall comply with Barret C-2 specifications of May 1, 1936, for Industrial Pure Benzene (benzol). Upon the completion of treatment and rerunning of the untreated benzol, the finished C-2 benzol shall be delivered into tank truck and trailer shipping facilities to be supplied by Corporation or stored in existing facilities on the premises; provided Shell shall not be required to

Exhibit G—(Continued)

2,200

furnish storage for more than ~~1,700~~ barrels finished C-2 benzol, and Corporation shall arrange to take deliveries of finished C-2 benzol at such times and in such quantities as to prevent congestion of the finished C-2 benzol storage facilities and to prevent delay in treating and rerunning operations.

Corporation shall pay to Shell for treating and rerunning untreated benzol hereunder during each calendar month of the term hereof:

(a) An amount computed in accordance with the following schedule based upon the total volume of untreated benzol accepted by Shell from untreated benzol storage at Wilmington for treatment and rerunning hereunder during the month involved:

If less than 250,000 gallons untreated benzol is accepted by Shell for treatment and rerunning hereunder (Shell shall be required to accept a minimum of 250,000 gallons during the month if available), \$2,400.00.

If between 250,000 and 350,000 gallons is accepted, 0.96c per gal. [70]

If between 350,001 and 450,000 gallons is accepted, 0.75c per gal.

If over 450,000 gallons is accepted, 0.65c per gal. plus

(b) The price paid by Shell for chemicals purchased by Shell for use in treating untreated benzol, hereunder during such time as the chemicals are not supplied to Shell by Corporation.

Exhibit G—(Continued)

4. Delivery of Finished C-2 Benzol: Shell shall deliver finished C-2 benzol to Corporation hereunder into tank truck and trailer shipping facilities supplied by Corporation at tank truck and trailer loading facilities maintained in connection with the finished C-2 benzol storage facilities. Corporation shall pay Shell 0.05c for each gallon finished C-2 benzol so delivered and loaded into tank trucks and trailers.

5. Use of Treating and Rerunning Facilities: In addition to the payments provided above to be made to Shell, Corporation shall pay to Shell each month a charge for use of Shell's treating and rerunning facilities used hereunder of six per cent (6%) per annum on its original capital investment in such facilities. The amount of Shell's capital investment shall be set forth in a statement to Corporation upon the completion of the installation of the necessary facilities. Shell's present estimate of the amount of such capital investment is Fifty-six

~~two~~ Thousand and Ten Dollars (\$56,10.00), and on the basis thereof the charge would amount to

Eighty
Two Hundred ~~Sixty~~ Dollars and Five Cents (\$280.05) per month. The monthly payment shall be determined in accordance with final figures submitted in pursuance hereof.

6. Payment: Shell shall, on or before the fifteenth (15th) day of each month during the term hereof, submit to Corporation an itemized statement of all charges accruing hereunder [71] for

Exhibit G—(Continued)

the preceding month, and Corporation shall pay to Shell the amount thereof promptly and not later than the 25th day of such month.

7. Losses: Shell shall be under no obligation with respect to losses resulting from handling untreated benzol for treatment and rerunning hereunder or for losses resulting from the treatment and rerunning of untreated benzol hereunder, excepting Shell shall exercise ordinary care in such handling, treatment and rerunning, and any insurance required by Corporation for the purpose of covering any losses shall be acquired and carried by Corporation for its own account. Shell shall not be chargeable with shrinkage losses due to evaporation or otherwise, or handling losses occurring during handling, treatment and rerunning of untreated or finished C-2 benzol under this agreement.

8. Benzol Tops and Bottoms and Acid Sludge:

A. Benzol tops and bottoms resulting from the treating and rerunning of untreated benzol hereunder shall be the property of Corporation, and Corporation shall arrange for their removal from Shell's premises or other disposal, at such times and in such quantities as will prevent congestion of Shell's facilities or delay of operations hereunder. Shell shall deliver such tops and bottoms into tank truck and trailer shipping facilities to be supplied by Corporation. Corporation shall pay Shell a loading charge of 0.05c per barrel for all tops and bottoms loaded by Shell hereunder. Payments shall be

Exhibit G—(Continued)

made monthly as provided in Paragraph 6 of this agreement.

B. Shell will arrange for disposal of all acid sludge resulting from Shell's operations hereunder without further cost to Corporations, and Shell shall not be required to account to [72] Corporation for such acid sludge.

9. Records: Shell shall keep separate books and records which will clearly reflect receipts by Shell of untreated benzol for treatment hereunder, and the quantity of finished C-2 benzol and benzol tops and bottoms resulting from such treatment. From time to time, upon request of Corporation, Shell shall furnish Corporation such additional information as Corporation may request in connection with the carrying out of the provisions of this agreement. Shell will permit representatives of Corporation, during usual hours of business, to audit or examine the aforesaid books and records for the purpose of auditing and verifying reports furnished pursuant to this agreement and the performance by Shell of its terms.

10. Determination of Quantities: The quantity of untreated benzol received hereunder by Shell for treatment and rerunning shall be determined by gauge of Shell's untreated storage tanks at Wilmington from which untreated benzol is delivered to the treating facilities. The quantity of finished C-2 benzol and benzol tops and bottoms delivered by Shell to Corporation hereunder shall be determined by gauge of the delivery facility into which

Exhibit G—(Continued)

deliveries are made. The volume of benzol so delivered shall, in each instance, be corrected to 60° F., using a coefficient of expansion of 0.00065 per degree variation.

11. Miscellaneous Provisions: In carrying out this agreement, Shell agrees to comply with and give all stipulations and representations required by applicable Federal laws, and further agrees to require compliance, representations and stipulations with respect to any contract entered into by it with [73] others incidental to or in connection with this agreement as may be required by applicable Federal laws; notwithstanding the generality of the foregoing, Shell further agrees that in the performance of this agreement it will not discriminate against any worker because of race, creed, color or national origin. Shell is a corporation, and this agreement is made with it for its general benefit, and no member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise therefrom in violation of the laws of the United States covering such matters.

12. Force Majeure: Shell shall not be liable for any failure or delay in performance of its obligations hereunder which may be caused or occasioned by any act of God, war, accident, fire, earthquake, insurrection, governmental action, strike, riot, total or partial failure of transportation facilities or supplies, or other cause, whether of a

Exhibit G—(Continued)

similar or dissimilar nature, beyond the reasonable control of Shell.

13. Duration: This contract shall remain in full force ~~and effect~~ for a period beginning on the date of commencement of processing hereunder and extending to a date of 30 days after the cessation of hostilities between the United States and Germany, Italy, and Japan; provided, however

(a) That this contract shall not expire prior to the expiration of three calendar months next following the date of commencement of processing hereunder;

(b) Supplies Corporation may terminate this contract at any time after processing has begun by thirty days prior written notice in event the benzol purified by Shell hereunder does not meet the specifications set forth in Paragraph 3; [74]

(c) Supplies Corporation may terminate this contract at any time after the expiration of three calendar months from the date of commencement of processing hereunder by thirty days prior written notice.

14. Renegotiation: This agreement is subject to the terms and provisions of Addendum No. 1 attached hereto and made a part hereof.

15. Notices: Any notice given hereunder shall be deemed to have been properly given when deposited in the United States mail in a sealed envelope, registered and postage prepaid, addressed to Corporation at 811 Vermont Avenue, N. W., Wash-

Exhibit G—(Continued)

ington 25, D. C., or to Shell at 100 Bush Street, San Francisco, California, as the case may be.

In Witness Whereof, the parties hereto have caused this agreement to be executed as of the day and year first hereinabove written.

DEFENSE SUPPLIES
CORPORATION,

By /s/ STUART K. BARNES,
Vice President.

SHELL OIL COMPANY,
INCORPORATED,

By /s/ N. CLULOW,
Vice President.

By /s/ A. R. BRADLEY,
Assistant Secretary.

EXHIBIT H

Defense Supplies Corporation
811 Vermont Ave., N.W.
Washington, D. C.

No. 15-S-62

CONTRACT

Seller: Defense Supplies Corporation, 811 Vermont Ave., N. W., Washington, D. C., agrees to sell,

Buyer: Wilshire Oil Company, Inc., 1206 Maple Ave., Los Angeles, California, agrees to buy,

Material: Benzol meeting specifications of indus-

trial pure benzol, designated as Barrett No. C-2 specifications, dated May 1, 1936.

Quantity: Indefinite, depending on Buyer's requirements, allocations by the War Production Board, and availability of Seller's material of quality indicated.

Price: 17 cents a gallon, f.o.b. tank cars or tank trucks at Seller's storage leased from Shell Oil Company, Inc., at Wilmington, California.

Shipment: Shipments will be arranged by the Buyer, the Seller to make the material available at point of origin upon receipt and acceptance of Buyer's purchase order. Tanker shipments will be arranged by Seller.

Measurement: All shipments shall be corrected to volume at 60°F. with a temperature correction factor of .00065 per degree Fahrenheit. Barge and tanker shipments shall be measured by commercial inspectors engaged by Seller at Buyer's expense unless such inspection is expressly waived by the Buyer, in which case Seller's measurement shall control. Rail or truck shipments shall be measured on the basis of volume in cars or trucks.

Payment: Cash, promptly upon receipt of Seller's invoices supported by evidence of the quantity shipped.

Special Conditions:

1. Buyer is not obligated to purchase nor Seller to supply any fixed amount of material under this contract it being understood that this agreement defines the terms of such purchases as may be made until cancellation of this contract.

2. Either party may cancel this contract upon notice in writing to the other.

3. No Member of or Delegate to the Congress of the United States shall be admitted to any share or part of this contract, or to any benefit arising therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit. Buyer agrees that he will not discriminate against any employee [76] or applicant for employment because of race, creed, color, or national origin, and will include a similar provision in all contracts entered into with others in the performance of this Agreement.

4. All material purchased under this contract will be used by Buyer in the manufacture of cumene, for use by or as directed by the United States government. It is understood that no tax is included in the purchase price. Buyer agrees to furnish Seller with satisfactory certificate of exemption covering such taxes as may be applicable.

Executed in quadruplicate.

WILSHIRE OIL COMPANY, INC.,

Buyer.

By /s/ M. A. (Signature illegible),

Vice President.

Date: 11/26/43.

DEFENSE SUPPLIES

CORPORATION,

(GS) Seller.

By /s/ STUART K. BARNES,

Vice President.

Date: 11/16/43.

EXHIBIT I

Defense Supplies Corporation

811 Vermont Ave., N. W.

Washington, D. C.

No. 15-S-69

CONTRACT

Seller: Defense Supplies Corporation, 811 Vermont Ave., N. W., Washington, D. C., agrees to sell,

Buyer: Richfield Oil Corporation, Richfield Building, Los Angeles, California, agrees to buy,

Material: Benzol meeting specifications of industrial pure benzol, designated as Barrett No. C-2 specifications, dated May 2, 1936.

Quantity: Indefinite, depending on Buyer's requirements, allocations by the War Production Board, and availability of Seller's material of quality indicated.

Price: 17 cents per gallon, f.o.b. tank cars or tank trucks at Seller's storage leased from Shell Oil Company, Inc., at Wilmington, California.

Shipment: Shipments will be arranged by the Buyer, the Seller to make the material available at point of origin upon receipt and acceptance of Buyer's purchase order. Tanker shipments will be arranged by Seller.

Measurement: All shipments shall be corrected to volume at 60°F. with a temperature correction factor of .00065 per degree Fahrenheit. Barge and

tanker shipments shall be measured by commercial inspectors engaged by Seller at Buyer's expense unless such inspection is expressly waived by the Buyer, in which case Seller's measurement shall control. Rail or truck shipments shall be measured on the basis of volume in cars or trucks.

Payment: Cash, promptly upon receipt of Seller's invoices supported by evidence of the quantity shipped.

Special Conditions:

1. Buyer is not obligated to purchase nor Seller to supply any fixed amount of material under this contract it being understood that this agreement defines the terms of such purchases as may be made until cancellation of this contract.

2. Either party may cancel this contract upon notice in writing to the other.

3. No Member of or Delegate to the Congress of the United States shall be admitted to any share or part of this contract, or to any benefit arising therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its [78] general benefit. Buyer agrees that he will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and will include a similar provision in all contracts entered into with others in the performance of this Agreement.

4. All material purchased under this contract will be used by Buyer in the manufacture of cumene,

for use by or as directed by the United States government. It is understood that no tax is included in the purchase price. Buyer agrees to furnish Seller with satisfactory certificate of exemption covering such taxes as may be applicable.

Executed in quadruplicate.

.....,

Buyer.

By /s/ A. M. KEELEY,
Vice President.

Date: 12/15/43.

DEFENSE SUPPLIES
CORPORATION

Seller,

By /s/ STUART K. BARNES,
Vice President.

Date: 12/3/43.

GS

EXHIBIT J

Defense Supplies Corporation
811 Vermont Ave., N. W.
Washington, D. C.

No. 15-S-61

CONTRACT

Seller: Defense Supplies Corporation, 811 Vermont Ave., N. W., Washington, D. C. agrees to sell,
Buyer: Rubber Reserve Company, 811 Vermont Ave., N. W., Washington, D. C., agrees to buy,

Material: Benzol meeting specifications of industrial pure benzol, designated as Barrett No. C-2 specifications, dated May 1, 1936.

Quantity: Indefinite, depending on Buyer's requirements, allocations by the War Production Board, and availability of Seller's material of quality indicated.

Price: 17 cents a gallon f.o.b. tank cars or tank trucks at Seller's storage leased from the Shell Oil Company, Inc., at Wilmington, California.

Shipment: Shipments will be arranged by the Buyer, the Seller to make the material available at point of origin upon receipt and acceptance of Buyer's purchase order. Tanker shipments will be arranged by Seller.

Measurement: All shipments shall be corrected to volume at 60°F. with a temperature correction factor of .00065 per degree Fahrenheit. Barge and tanker shipments shall be measured by commercial inspectors engaged by Seller at Buyer's expense unless such inspection is expressly waived by the Buyer, in which case Seller's measurement shall control. Rail or truck shipments shall be measured on the basis of volume in cars or trucks.

Payment: Cash, promptly upon receipt of Seller's invoices supported by evidence of the quantity shipped.

Special Conditions:

1. Buyer is not obligated to purchase nor Seller to supply any fixed amount of material under this

contract it being understood that this agreement defines the terms of such purchases as may be made until cancellation of this contract.

2. Either party may cancel this contract upon notice in writing to the other.

3. No Member of or Delegate to the Congress of the United States shall be admitted to any share or part of this contract, or to any benefit arising therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit. Buyer agrees that he will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and will include a similar provision in all contracts entered into with others in the performance of this Agreement. [52]

4. All material purchased under this contract will be used by Buyer in the manufacture of styrene, for use by or as directed by the United States government. It is understood that no tax is included in the purchase price. Buyer agrees to furnish Seller with satisfactory certificate of exemption covering such taxes as may be applicable.

Executed in Sextuplicate.

RUBBER RESERVE COMPANY

Buyer,

By /s/ H. J. KLOSSNER,

President.

Date: Dec. 11, 1943.

DEFENSE SUPPLIES

CORPORATION,

Seller.

By /s/ STUART K. BARNES,

Vice President.

GS

Date: 11/30/43.

EXHIBIT K

CHARTER OF RUBBER RESERVE
COMPANY

Whereas, in order to aid the government of the United States in its national-defense program, Reconstruction Finance Corporation is authorized, pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended by the Act approved June 25, 1940, when requested by the Federal Loan Administrator, with the approval of the President, to create corporations with power to produce, acquire and carry strategic and critical materials, as defined by the President; and

Whereas, The President has defined rubber as a strategic material; and

Whereas, The Federal Loan Administrator has requested and the President has approved the creation of a corporation of the character described in paragraph Third hereof;

Now, Therefore, It is stated that:

First, Reconstruction Finance Corporation does hereby create a corporation to be known as Rubber Reserve Company.

Second, the location of the principal office of the corporation shall be in the City of Washington, District of Columbia.

Third, the objects and purposes of the corporation shall be to perform all acts and transact all business which is permitted legally to be done, performed, and transacted in [54] connection with the buying, selling, acquiring, storing, carrying, producing, processing, manufacturing and marketing of natural raw or cured rubber, as well as related materials and substances; and the corporation shall have power to do all things incidental thereto and necessary or appropriate in connection therewith, including, but without limitation, the power to borrow and hypothecate, to adopt and use a corporate seal, to make contracts, to acquire, hold and dispose of real and personal property necessary and incident to the conduct of its business and to sue and be sued in any court of competent jurisdiction. The corporation, including its franchise, its capital, reserves, surplus, income and assets shall be exempt from all taxation now or hereafter imposed by the United States, or

any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except that any real property of the corporation shall be subject to State, Territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed; the corporation shall be entitled to the free use of the United States mails; and, in addition to or in limitation of the privileges and immunities belonging to it as an instrumentality of the United States government, the corporation shall in all other respects be possessed of such privileges and immunities as are conferred upon Reconstruction Finance Corporation under the Reconstruction Finance Corporation Act, as amended. [55]

Fourth, the total authorized capital stock of the corporation shall be Five Million Dollars (\$5,000,000), consisting of 50,000 shares of the par value of \$100 each, of which One Million Dollars (\$1,000,000) shall be paid in immediately and the balance as called. Such stock shall be of one class, shall be non-assessable and shall be issued only for cash fully paid. Reconstruction Finance Corporation shall subscribe for all of the capital stock of the corporation. Such stock shall not be transferable, except with the approval of Reconstruction Finance Corporation (and then only to the extent that Reconstruction Finance Corporation deems it desirable that any such stock be transferred to members of the rubber industry for the purpose of furnishing assurance of their cooperation in the conduct of the activities of the corporation, facilitating the ultimate liquidation

of the assets of the corporation, and thereby protecting the interests of the United States Government acting by and through Reconstruction Finance Corporation).

Fifth, the corporation shall have existence until dissolved by Reconstruction Finance Corporation.

Sixth, the stockholders shall not be liable for the debts, contracts or engagements of the corporation except to the extent of unpaid stock subscriptions.

Seventh, the corporation shall be managed by its Board of Directors, officers and agents pursuant to this Charter and the provisions of the By-Laws of the corporation as prescribed by Reconstruction Finance Corporation. [56]

Eighth, this Charter and the By-laws may be amended at any time by the Board of Directors of the corporation, upon approval of Reconstruction Finance Corporation.

In Witness Whereof, Reconstruction Finance Corporation has caused this Charter to be signed by its executive officer, Chairman of its Board of Directors, attested by its Secretary, and has caused its seal to be hereunto affixed this 28th day of June, 1940.

RECONSTRUCTION FINANCE
CORPORATION,

By /s/ EMIL SCHRAM,
Chairman.

Attest:

/s/ G. R. COOKSEY,
Secretary.

EXHIBIT L

RUBBER RESERVE COMPANY BY-LAWS
OFFICES

1. The principal office shall be in the City of Washington, District of Columbia. The corporation shall also have branch offices at such other places as the Board of Directors may from time to time designate.

SEAL

2. The corporate seal shall have inscribed thereon the name of the corporation and the date of its creation. Said seal may be used by causing it or a facsimile thereof to be impressed or affixed or reproduced.

BOARD OF DIRECTORS

3. The directors shall be not less than six nor more than ten in number, as the Board of Directors of Reconstruction Finance Corporation may provide. The directors shall be appointed by Reconstruction Finance Corporation. Each director shall hold office until and including the thirty-first day of December of the year in or for which appointed and until his successor shall be duly appointed and qualified.

MEETINGS OF THE BOARD

4. Regular meetings of the Board of Directors shall be held at such time and place as the Board may prescribe. Special meetings may be called by the President or Secretary. At any meeting of the

Board a majority of the duly appointed and qualified directors shall constitute a quorum for the transaction of any business that may come before the meeting.

COMMITTEES OF THE DIRECTORS

5. The Board of Directors shall select from its number an Executive Committee, consisting of such members of the Board as may be deemed advisable, who shall have, possess and exercise all of the power and authority of the Board of Directors at such times as the Board of Directors is not in session, and also such power and authority as may be delegated to it by the Board of Directors. The Board of Directors may create such additional committees and confer upon them such duties and powers as it may deem advisable.

COMPENSATION OF DIRECTORS

6. The directors of the corporation shall receive no fees or honorarium for attendance at meetings but shall be entitled to be reimbursed in accordance with the Standardized Government Travel Regulations, as amended, for travel expenses [58] incurred in attending meetings of the Board of Directors and meetings of the committees of which they are members, and any other travel expenses incurred by them on official business.

OFFICERS

7. The officers of the corporation, who shall be appointed by the Board of Directors to serve until

their successors shall be duly appointed and qualified, shall be: a Chairman of the Board of Directors, a president, one or more vice-presidents, a secretary, a treasurer, a general counsel, and such other officers and agents as the Board of Directors may deem advisable. The president shall be a director. The salaries and compensation of all officers, agents and employees shall be fixed by the Board of Directors and paid by Reconstruction Finance Corporation and reimbursed by the corporation. Any officer, agent or employee may be removed by the Board of Directors at any time, with or without cause.

CHAIRMAN OF THE BOARD

8. The Chairman of the Board of Directors shall have general supervision over the business of the corporation and shall preside at meetings of the Board of Directors.

PRESIDENT

9. The President shall be the chief executive officer of the corporation and, in the absence of the Chairman of the Board, shall preside at meetings of the Board. Except as hereinafter provided, or as otherwise prescribed by the Board of Directors or Executive Committee, all contracts and other documents which the corporation may be required to execute in the conduct of its business shall be signed by the President.

VICE-PRESIDENT

10. In the absence or disability of the President,

the Vice-President (or Vice-President, in the order of their seniority if more than one) shall perform the duties and execute the powers of the President. They shall perform such other duties as the Board of Directors may prescribe.

SECRETARY

11. The Secretary shall attend all meetings of the Board of Directors and Executive Committees and record the minutes of all such meetings. He shall give, or cause to be given, notice of all such meetings; shall perform such duties as may be prescribed by the Board of Directors or the Executive Committee, and all other duties incident to the office of Secretary. He shall keep in safe custody the seal of the corporation, and shall affix the same to any instrument requiring it. When so affixed, the seal shall be attested by the signature of the Secretary.

TREASURER

12. The Treasurer shall have the custody of the corporate funds and securities and shall keep a full and accurate account of all financial transactions of the corporation, and shall deposit with [59] Reconstruction Finance Corporation all funds for the account of the corporation or in such other depositories as may be designated or approved for the purpose by Reconstruction Finance Corporation. He shall disburse the funds of the corporation pursuant to the authority of the Board of Directors or Executive Committee of the corporation, and shall render to the Board of Directors or Executive Committee of

the corporation, whenever so required, an account of all his transactions as Treasurer and of the financial condition of the corporation. He shall, if so required by the corporation, give a bond in a form and sum satisfactory to the corporation and Reconstruction Finance Corporation.

GENERAL COUNSEL

13. The General Counsel shall be the chief consulting officer in all legal matters and will supervise such matters for the corporation.

FISCAL YEAR

14. The fiscal year shall end on the thirty-first day of December in each year.

OATH OF OFFICE

15. All directors, and officers (and other agents or employees of the corporation, when so required by the Board of Directors or Executive Committee) shall subscribe to the oath of office prescribed by Section 1757, Revised Statutes of the United States.

CHECKS

16. Unless otherwise prescribed by the Board of Directors, all checks and drafts for authorized disbursements issued by the corporation shall be signed by the Treasurer or an Assistant Treasurer acting under his direction. Reconstruction Finance Corporation at the request of the Board of Directors of the corporation shall certify to the Treasurer of the United States the names of the incumbents of all

offices, the holders whereof have such signatory powers.

STOCK CERTIFICATES

17. The stock certificates or receipts for payments for or on account of the stock subscribed, shall be signed by the President or a Vice-President and by the Secretary of the corporation.

EXPENSES

18. All expenses incurred in connection with the operation of the corporation shall be supervised and paid in such manner as the Board of Directors or Executive Committee may from time to time prescribe.

NOTICES

19. Whenever under the provisions of these By-laws any notice is required to be given, it shall not be construed to mean [60] personal notice, but such notice may be given by mail, telephone or telegraph. Any requirement as to notice may be waived in writing by the party entitled thereto.

AMENDMENTS

20. These By-laws may be altered or amended or repealed by the Board of Directors of the corporation at any meeting of such Board, upon approval of the Board of Directors of Reconstruction Finance Corporation. [61]

EXHIBIT M

SUPPLY CONTRACT

This amended contract made and entered into as of the 20th day of December, 1943, by and between Defense Supplies Corporation, a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, (hereinafter referred to as "Buyer") and Wilshire Oil Company, Inc., a corporation of California, with offices in Los Angeles, California, (hereinafter referred to as "Seller").

Witnesseth:

Whereas, the production of 100 octane aviation gasoline and other aviation gasoline conforming to the specifications provided for in Appendix A annexed hereto and made a part hereof (such 100 octane aviation gasoline and such other aviation gasoline being herein called "aviation gasoline") and the expansion of refining capacity for such production within the United States are important to the interest of the National Defense Program of the Government of the United States; and

Whereas, a Supply Contract was entered into on the 29th day of April, 1942, by and between Buyer and Seller (hereinafter referred to as the "Original Supply Contract") providing for the purchase and sale of 100 octane aviation gasoline to be produced in certain facilities to be constructed at Seller's refinery at Norwalk, California; and

Exhibit M—(Continued)

Whereas, Seller, simultaneously with the execution of the Original Supply Contract, entered into an Agreement of Lease with Defense Plant Corporation, a subsidiary of Reconstruction [90] Finance Corporation, (hereinafter referred to as the "Agreement of Lease") to construct at its said refinery (hereinafter sometimes called "Plant No. 1"), the facilities aforesaid which were then estimated to be capable of manufacturing 1,900 barrels per day of 100 octane aviation gasoline on a basis of 3 cc. of tetra-ethyl lead per gallon (hereinafter sometimes called the "Original Defense Plant Facilities"), said facilities to be operated by Seller under lease from Defense Plant Corporation; and

Whereas, it is now estimated that the Original Defense Plant Facilities are capable of manufacturing approximately 2,683 barrels per calendar day of 100 octane aviation gasoline conforming to specifications set forth in Item 1 of Appendix A hereof; and

Whereas, Seller is simultaneously entering into an Amended Agreement of Lease with Defense Plant Corporation which amends the Agreement of Lease and by the terms of which Seller agrees to construct at its said refinery, in addition to the Original Defense Plant Facilities, certain additional facilities which, it is estimated, will increase the production of the Defense Plant Facilities to approximately 3,100 barrels per calendar day of 100 octane aviation gasoline conforming to specifications set

Exhibit M—(Continued)

forth in Item 1 of Appendix A hereof, when blended with 146 barrels per calendar day of purchased isopentane. Said additional facilities are hereinafter sometimes referred to as "Additional Defense Plant Facilities." The Original Defense Plant Facilities and the Additional Defense Plant Facilities are herein sometimes collectively referred to as the "Defense Plant" or the "Defense Plant Facilities" or "Plant No. 2": (the Agreement of Lease as amended, being hereinafter referred to as the "Amended Agreement of Lease") and [91]

Now, Therefore, in consideration of the mutual covenants herein contained, it is agreed by and between the parties hereto that the Original Supply Contract be and the same is hereby amended to read as follows:

1. Defense Plant Facilities to Be Operated by Seller.

Seller shall, as expeditiously as possible, subject to the terms, conditions, and provisions of the Amended Agreement of Lease with Defense Plant Corporation provide all things necessary for operation of said Defense Plant Facilities at or adjacent its refinery at Norwalk, California, and place said Defense Plant Facilities in operation. Said facilities are estimated but not guaranteed to be of sufficient capacity to produce, after completion of the Original Defense Plant Facilities but prior to the completion of the Additional Defense Plant Facilities, approximately 2,683 barrels per calendar day, and

Exhibit M—(Continued)

after the completion of the Additional Defense Plant Facilities (when adding 146 barrels per calendar day of purchased isopentane) approximately 3,100 barrels per calendar day of 100 octane aviation gasoline conforming to the specifications set forth in Item 1 of Appendix A hereof, and throughout the period of this contract Seller shall use its best efforts to continue the operation thereof in an efficient manner. During the period of this contract, Seller will not, without the consent of Buyer and Defense Plant Corporation, remove, alter, modify or in any manner deal with the said facilities so as to hinder, lessen or make impossible the production of aviation gasoline.

2. Notice and Sale of Products.

(a) The method of computing rental payable to Defense Plant Corporation for the Defense Plant Facilities is set forth and explained in the explanation of symbol "C" of Appendix B hereof. Rent becomes payable for the alkylation unit and for [92] all equipment used in connection therewith from and after December 21, 1943. Rent for additional units and for equipment used in connection with such additional units shall begin to accrue when and as operation and use for the designed purpose of the unit in question is undertaken by Seller. In order that Buyer may be notified when such use is so undertaken with respect to each unit; Seller agrees to promptly notify Buyer whenever rental

Exhibit M—(Continued)

first becomes payable with respect to each additional unit of the Defense Plant Facilities.

(b) Seller shall produce aviation gasoline by means of the Defense Plant Facilities, conforming to the specifications set forth in Appendix A hereof, and/or Components thereof, as directed by Buyer, and Seller shall offer to sell to Buyer all of the aviation gasoline and/or Components so produced, deliveries of aviation gasoline ordered by Buyer to commence as soon as practicable after the facilities have been put into operation. Buyer shall be obligated, subject to the provisions of subparagraph (d) of this paragraph 2, and subject to the provisions of paragraph 3 hereof, to purchase aviation gasoline produced by said facilities in quantities approximating the current rate of production, insofar as feasible, of such gasoline conforming to the specifications set forth in item 1 of Appendix A hereof (or in equivalent quantities of aviation gasoline conforming to any or all of the specifications provided for in Appendix A hereof), and shall have the right to purchase all of such aviation gasoline as aforesaid but shall not be obligated to purchase more than 2,171 barrels, daily average of such gasoline, conforming to the specifications as aforesaid (or equivalent quantities of gasoline conforming to any or all of the specifications provided for in Appendix A hereof), in any month during the Original Period and the Extension Period of this contract. [93]

(c) Seller agrees that, to the extent of its abil-

Exhibit M—(Continued)

ity to do so using the Defense Plant Facilities, Seller will purchase available Components of and charge stocks for the manufacture of 100 octane aviation gasoline from other manufacturers of such Components and charge stocks at the request of Buyer, and utilize such Components and charge stocks with Components and charge stocks manufactured by Seller to produce 100 octane aviation gasoline conforming to the specifications set forth in Item 1 of Appendix A hereof or such other specifications of Appendix A as Buyer may direct. Such Components and charge stocks shall be purchased currently in amounts, from sources and at prices approved by Buyer, and shall be delivered to the Defense Plant Facilities. In the event Buyer so requests Seller to purchase such Components and charge stocks, Seller shall sell and Buyer shall buy the entire 100 octane aviation gasoline produced therefrom; subject, however, to termination of this contract in accordance with the provisions of paragraph 3 hereof.

(d) Buyer shall have the option, exercisable at any time and from time to time during the life of this contract, to purchase from Seller, or Buyer may direct Seller to sell to third parties specified by Buyer any Components for the manufacture of 100 octane aviation gasoline which may be produced in the Defense Plant Facilities and any charge stocks in excess of Seller's current requirements for such charge stocks in connection with the manufacture of aviation gasoline. Seller shall sell such Components and charge stocks to Buyer or to such

Exhibit M—(Continued)

third parties at prices and in amounts to be specified by Buyer. Seller agrees to accept the credit rating of Buyer's designees unless and until it notifies Buyer that it desires indemnification against nonpayment of its invoices in which case Buyer shall execute such letter of indemnification or designate another [94] purchaser having a credit rating satisfactory to Seller.

(e) As used in this contract, the term "Components" shall mean all substances and materials which are incorporated into 100 octane aviation gasoline by Seller by blending operations which comprise a physical mixture only, without chemical change, but shall not include inhibitors or tetraethyl lead.

3. Duration of Contract and Right to Terminate.

This contract shall be for a period commencing on the date hereof and ending at midnight on December 31, 1946 (hereinafter called the "Original Period"), provided, however, that if this contract shall be extended as provided in paragraph 12 hereof, then the period of this contract shall include the period of such extension (hereinafter called the "Extension Period") in accordance with the provisions of said paragraph 12. Buyer shall have the right in its sole discretion to terminate this contract or any extensions thereof at any time, on notice to Seller, and in the event of termination of the aforesaid Amended Agreement of Lease between Seller and Defense Plant Corporation this

Exhibit M—(Continued)

contract or any extension thereof shall automatically terminate. Wherever in this contract, including the appendices, the words "the period of this contract" are used, such words shall be construed to include the Extension Period as well as the Original Period.

4. Price.

The price to be paid by Buyer for aviation gasoline produced hereunder and the amount of money to be paid by Buyer for aviation gasoline hereunder or the amount of money to be paid by Buyer or by Seller, as the case may be, for any calendar month in which aviation gasoline is not made, shall be determined in accordance with Appendix B hereof. Determination of such price and such amount of money in accordance with Appendix [95] B hereof shall be made from 7 A.M., December 21, 1943, the time at which Seller represents that oil was first charged to the first catalytic unit of the Defense Plant Facilities for the purpose of making product; said date and hour being hereinafter referred to as the "Start Up Date."

5. Buyer or Seller, as the case may be, shall pay promptly, but not later than the 20th day of each calendar month, all money due hereunder for operations conducted during the preceding calendar month, the amount of each such payment to be determined in accordance with the provisions of Appendix B hereof. On or before the 10th day of each calendar month in which such payments are

Exhibit M—(Continued)

to be made, Seller shall render to Buyer a statement setting forth, 1) the number of gallons of aviation gasoline produced hereunder during the preceding calendar month, 2) the cost of production thereof per gallon, 3) the total amount to be paid therefor, 4) the number of gallons of aviation gasoline delivered hereunder during said preceding calendar month, 5) the number of gallons of charge stocks and Components purchased during the preceding calendar month and the number of gallons of purchased Components incorporated in aviation gasoline produced hereunder during the preceding calendar month and from whom such Components and charge stocks were purchased, 6) the price per gallon of each such purchased charge stock or Component paid or payable by Seller, 7) the number of gallons of charge stocks or Components sold by Seller during the preceding calendar month, the type of charge stocks and components so sold and to whom sold, specifying the number of gallons of each such type, 8) the price per gallon for which each such charge stock or Component was sold, 9) the total amount received by Seller during the preceding month for charge stocks and Components sold during said month or during any prior [96] month, specifying the gallonage reported pursuant to 7 hereof, for which such payment was received, 10) the number of gallons of each by-product sold during the preceding calendar month, the price for which each such by-product was sold and the amount of money received for by-products during said

Exhibit M—(Continued)

month, 11) the number of gallons of aviation gasoline held in storage hereunder at the beginning and at the end, respectively, of said preceding calendar month, 12) the number of gallons of Components and charge stocks produced in the Defense Plant Facilities held in storage at the beginning and at the end, respectively, of said preceding calendar month, and 13) all other information which may be needed by Buyer in order to determine and substantiate the sums due under paragraph 4 hereof and under Appendix B hereof. Each such statement shall be certified as to quantities and qualities shown, by a licensed inspector, or other inspector, satisfactory to Buyer. The inspection procedure and form of certificate shall conform to usual industry practice. Buyer may, at its option, waive the requirements of inspection by a licensed inspector or other inspector, and in such event, and in case of shipments made from the Defense Plant Facilities when no licensed inspector or other inspector is available, Seller shall furnish its own certificates of inspection. The amount, if any, by which the payment due Seller from Buyer for aviation gasoline produced during said preceding calendar month exceeds the amount computed by multiplying the number of gallons of aviation gasoline delivered by Seller to Buyer during said calendar month by the above-mentioned price per gallon of aviation gasoline produced during said month shall constitute an advance payment by Buyer to Seller for aviation gasoline and Components thereof produced and

Exhibit M—(Continued)

placed in storage by Seller during the preceding month to be delivered to Buyer. Seller shall place all aviation gasoline produced hereunder in [97] storage immediately upon production thereof to await delivery to Buyer. Copies of the certificates of inspection referred to in paragraph 9 hereof shall accompany the aforesaid monthly statements.

On or before the 10th day of each calendar month in which such payments are to be made, Seller shall render to Buyer a statement setting forth separately and in reasonable detail (1) Seller's gasoline refinery net back (2) Seller's adjusted gasoline refinery net back, and (3) Seller's fuel oil refinery net back, all as hereinafter defined in Appendix B, for the calendar month preceding the calendar month for which payment is to be made Seller under this paragraph. Seller shall advise Buyer of any change made in the price of fuel gas sold to Seller by Southern California Gas Company at Seller's Norwalk refinery not later than the 10th day of the calendar month following the calendar month in which such change occurred.

6. Deliveries.

Buyer shall take deliveries of said aviation gasoline every month during the period of this contract, in tank cars, or tank trucks, to be supplied by Buyer at its own cost and expense (except as otherwise provided in paragraph 17 hereof), at Seller's plant terminals at Norwalk, California, (hereinafter called the "point of delivery") in quantities ap-

Exhibit M—(Continued)

proximating the current rate of production insofar as feasible, but Buyer shall not be obligated to take deliveries in excess of a daily average of 2171 barrels. Deliveries shall be made in accordance with the delivery conditions at each loading point which currently are in effect with respect to deliveries made at such point to other customers.

Until further notice from Buyer to Seller, for the purposes of this contract, any officer or employee of the War Department or Navy Department, who is properly authorized to accept [98] deliveries of gasoline for his department is hereby nominated as agent for Buyer and authorized to take delivery of aviation gasoline hereunder, to waive the requirements of inspection by a licensed inspector or other inspector and to receipt on behalf on Buyer, in a manner approved by Buyer, for deliveries of such aviation gasoline from Seller to Buyer.

7. Products in Storage.

Under the aforesaid Amended Agreement of Lease between Defense Plant Corporation and Seller, tankage facilities approximating 100,000 barrels capacity will be furnished by Defense Plant Corporation on the Defense Plant site for the storage of aviation gasoline and/or Components produced hereunder. Seller shall not be obligated to provide any additional tankage facilities at the Defense Plant or elsewhere for the storage of such aviation gasoline and/or Components. At the ter-

Exhibit M—(Continued)

mination of this contract Buyer shall be obligated to purchase and pay for, at and for the price provided for in paragraph 4 hereof, all of the aviation gasoline of the specifications set forth in Appendix A hereof produced by Seller pursuant to this contract since the last month in which aviation gasoline was produced and paid for under this contract, and which at the termination of this contract is stored in said tankage facilities, and in addition such aviation gasoline as may be obtained after termination of this contract by blending ingredients of aviation gasoline theretofore produced by Seller pursuant to this contract and which are in Seller's inventory at the time of the termination of this contract, but the aggregate of such purchases required of Buyer shall not exceed 100,000 barrels. At the termination of this contract all undelivered aviation gasoline, if any, of the specifications set forth in Appendix A hereof and produced by Seller pursuant to this contract and paid for by Buyer shall become the [99] property of Buyer. Upon 30 days' notice from Buyer to Seller before the termination of this contract, Seller shall endeavor insofar as possible to arrange its production so that there will be a minimum of aviation gasoline stored in said tankage facilities at the termination of this contract. Buyer shall give to Seller, at its refinery at Norwalk, California, a reasonable advance notice of all specific deliveries of aviation gasoline and/or Components to be made under this contract, said notice to specify the volume of aviation gaso-

Exhibit M—(Continued)

line and/or Components and shipping instructions therefor, and Seller shall make delivery thereof in the volume specified if within its ability to do so.

8. Title to Products.

Seller warrants full and unencumbered title to all aviation gasoline and Components delivered under this contract. Title to said aviation gasoline shall pass from Seller to Buyer upon delivery of the aviation gasoline at the intake pipe of the means of transportation f.o.b. the point of delivery from which shipment is made. However, risk of loss on finished aviation gasoline produced hereunder by the Defense Plant Facilities shall be with Buyer from the time it is produced and placed in storage. Seller shall use due care in the storage of such aviation gasoline.

9. Inspections.

(a) On shipments made from the Defense Plant Facilities, where licensed inspectors or other inspectors are available, Seller shall furnish certificates of inspection by a licensed inspector or other inspector satisfactory to Buyer which shall set forth the quantity and quality of each shipment of aviation gasoline. The inspection procedure and the form of the certificates shall conform to usual industry practice. The certificates of inspection shall be issued in five counterparts, one set of which shall accompany the relative shipment, a second set of which shall be forwarded forthwith to Buyer, a third set of which shall be submitted [100] to Buyer

Exhibit M—(Continued)

with the monthly statement required by paragraph 5 hereof, a fourth set of which shall forthwith be delivered to Seller, and a fifth set of which shall be delivered forthwith to the authorized officer or employee of the War Department or Navy Department referred to in paragraph 6 hereof. Buyer may, at its option, waive the requirements of inspection by a licensed inspector or other inspector, and in such event, and in case of shipments made from the Defense Plant Facilities when no licensed inspector or other inspector is available, Seller shall furnish its own certificates of inspection.

(b) Inspection as to quantity of delivery into tank cars and tank trucks shall be made in accordance with the accepted practices of the trade. Adjustment in volume to a sixty degree Fahrenheit (60°F.) basis shall be made in accordance with the correction tables of the United States Bureau of Standards prevailing at the time of delivery; provided, however, that in case of each delivery of a quantity of less than three thousand five hundred (3,500) gallons into a tank truck or motor transport, no adjustment shall be made.

(c) Inspection as to quality shall be made according to the latest standard or tentative standard methods of the American Society for Testing Materials wherever applicable and the product shall conform as to quality with the specifications set forth in Appendix A hereof.

(d) The certificates of inspection of quantity

Exhibit M—(Continued)

and quality shall be accepted by Buyer and Seller as conclusive for purposes of invoice and payment, and all other purposes of this contract.

(e) Should any such certificate indicate a failure of the product shipped to conform completely to the specifications [101] of quality, Buyer may accept delivery of the product and claim an adjustment for such deficiency, provided, that in the event that such a claim is made Seller shall be notified and given an opportunity to inspect said shipment within five (5) days after arrival at destination but in any event before unloading.

(f) Buyer and its representatives shall have free and unrestricted access to the Defense Plant Facilities at all reasonable times in connection with such tests and inspections and likewise Seller shall have the right to have its own representatives present at all such tests and inspections, provided that, unless authorized in writing by Seller, not more than two representatives of Buyer shall have access at any time to said Facilities for the purposes of this paragraph 9.

10a. Force Majeure.

This contract is expressly conditioned upon and subject to all of the terms and provisions of the aforesaid Amended Agreement of Lease between Defense Plant Corporation and Seller pertaining to the construction, installation, operation, maintenance and/or repair of the Defense Plant Facilities

Exhibit M—(Continued)

and other facilities referred to therein, and Seller shall not be liable for damages or otherwise for delays or defaults in its performance under this contract where relieved under the terms and provisions of said Amended Agreement of Lease from the construction, installation, operation, maintenance and/or repair of such facilities or any part thereof.

Seller shall not be liable for delays or defaults in performance under this contract due to causes beyond its control and without its fault or negligence, including, but not restricted to, acts of God or of the public enemy, acts or requests of the Government or of any governmental officer or agent purporting to [74] act under authority, floods, fires, storms, epidemics, quarantine restrictions, strikes, freight embargoes and failures, exhaustion or unavailability, or delays in delivery, of any product, service or material necessary in the construction of the facilities contemplated by paragraph 1 hereof or in the manufacture and delivery of aviation gasoline deliverable hereunder, including crude oil, supplies, raw materials, ingredients and lead tetraethyl.

10b. Right to Periodic Review of Contract.

It is understood that performance by Seller under this contract and the price of aviation gasoline hereunder are predicated upon continuous, substantially normal operation of Seller's Norwalk refinery and the Defense Plant Facilities.

If through causes or conditions beyond Seller's or Buyer's control or knowledge, including the method

Exhibit M—(Continued)

of pricing petroleum materials passing to and from the Defense Plant Facilities, and without negligence or bad faith on the part of Seller or Buyer, such causes or conditions shall so affect operations or conditions at said refinery or said Defense Plant Facilities that, in the opinion of either Buyer or Seller, the contract shall have become inequitable, either party shall have the right, which shall not be exercised by the same party more than once in any six (6) months period, to give the other party written notice of such situation, fully explaining same. In such event the parties shall make an earnest effort to arrive at an equitable and mutually satisfactory adjustment of said price or other provisions of this contract, but, failing this, the party giving such notice shall have the right to cause the matter to be arbitrated and thereby finally determined according to the arbitration procedure specified in paragraph 13 hereof. The arbitrators shall [75] have the power to make an award in accordance with their determination of such matter. In the event that such matter is so determined by arbitration, such determination and award may be retroactive to the time when such causes became effective.

11. Separate Accounting.

So long as this contract or any extension thereof remains in effect Seller shall maintain a system of separate accounting satisfactory to Buyer, of the production and sales of all aviation gasoline produced under the terms of this contract and of the

Exhibit M—(Continued)

purchase and sale of any Components and charge stocks pursuant to the provisions of paragraph 2 hereof and agrees to make such records available for inspection by Buyer during the term of this contract and for a period of at least three (3) years after termination of this contract. Buyer and its representatives shall have free and unrestricted access to such records at all reasonable times for inspection and audit at the place where such records are kept by Seller provided that, unless authorized in writing by Seller, not more than five (5) representatives of Buyer shall have access to such records at any one time for the purposes of this paragraph 11.

12. Extension of Contract.

Buyer shall have the option to extend this contract for, but not longer than, two (2) successive yearly periods beyond the Original Period by giving notice in writing to Seller of the exercise of such option at least ninety (90) days prior to the end of the Original Period for the first yearly extension, and at least ninety (90) days prior to the end of the first yearly extension for the second yearly extension. In the event of, and during such extension or extensions, all the provisions of this contract, except those [76] not then applicable, shall be and remain in full force and effect.

13. Arbitration.

In case of any disagreement between Buyer and Seller as to any right, obligation, term or provision of this contract, including any disagreement as to

Exhibit M—(Continued)

the price to be paid for aviation gasoline to be delivered hereunder, the parties shall make an earnest effort to settle such disagreement to their mutual satisfaction. If such effort be unsuccessful, then either party may cause such disagreement to be submitted for determination by arbitrators, none of whom shall be connected with either party hereto, by giving to the other party a notice in writing or by telegraph to that effect and giving the name of the arbitrator chosen by the party giving the notice. Within five (5) days of receipt of such notice of arbitration, the other party shall, in writing or by telegraph, name the arbitrator chosen by such party, and within five (5) days after the appointment of the second arbitrator, an additional arbitrator shall be selected by the two (2) arbitrators theretofore appointed, provided, however, if one of the parties shall have failed to appoint an arbitrator as hereinbefore provided, the sole arbitrator shall arbitrate the disagreement alone. If two (2) arbitrators shall have been appointed as aforesaid and shall have failed to select an additional arbitrator within the above-stated time, the additional arbitrator shall be appointed by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit, acting in his individual capacity, upon application therefor by either of the parties. The decision of a majority of the arbitrators so appointed, or if either party shall have failed to appoint its arbitrator as aforesaid, the decision of [77] the sole arbitrator shall be final and binding on the parties for all pur-

Exhibit M—(Continued)

poses. Each party shall pay the cost and expenses of the arbitrator appointed by such party, and the other costs and expenses of the arbitration, including the cost and expense of the additional arbitrator, shall be paid by the party to the arbitration whose claim is not sustained or if partially sustained the costs shall be apportioned. Pending such determination of every disagreement as to the price to be paid for aviation gasoline delivered hereunder, Buyer shall, upon contesting any price claimed by Seller to be due, pay the price which Buyer alleges to be due and shall immediately upon such determination pay any balance found by mutual agreement or by said arbitrators to be due.

14. Notices.

All notices given under this contract, except as otherwise provided, shall be directed to the parties as follows: Defense Supplies Corporation, 811 Vermont Avenue, N. W., Washington, D. C.; Wilshire Oil Company, Inc., 1206 Maple Avenue, Los Angeles, California.

Any notice to be given hereunder shall be in writing and may be personally delivered or sent by telegram or registered mail to the party for whom intended at the address of such party as specified above. A notice personally delivered to either party must be personally delivered to an officer thereof. Notice by registered mail shall be deemed to have been given at the expiration of that time after mailing which is normally required by the postal au-

Exhibit M—(Continued)

thorities to make delivery. Telegraphed notice shall be deemed given the day after sending the telegram. Each party shall immediately send to the other by regular mail confirming copies of any notices sent by telegraph or air mail. [78] Either party may by notice given as aforesaid change its address for notices thereafter.

15. Assignability.

This contract shall be binding upon, and shall inure to the benefit of, the successors and assigns of the respective parties hereto; provided, however, neither party shall have the right to assign this contract without the written consent of the other party, except that Buyer may assign to any other agency, department or instrumentality of the Government or wholly Government-owned corporation, in which event Buyer shall remain liable.

16. Statutory Compliance.

In carrying out this contract Seller agrees to comply with, and give all stipulations and representations required by applicable federal laws and further agrees to require such compliances, representations and stipulations with respect to any contract entered into by it with others incidental to or in connection with this contract as may be required by applicable federal laws; and notwithstanding the generality of the foregoing, Seller further agrees that in the performance of this contract it will not discriminate against any employee or applicant for employment because of race, creed, color or national

Exhibit M—(Continued)

origin, and will include a similar provision in all contracts entered into by it with others in connection with such performance.

Seller is a corporation and this contract is made with it for its general benefit and no Member of, or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom in violation of the law of the United States covering such matters. [79]

Seller shall comply with requirements of the Walsh-Healey Act (41 USCA Sections 35-45) insofar as such Act is applicable to this transaction.

Notwithstanding anything herein contained to the contrary, this contract is subject to the provisions of Appendix C attached hereto and hereby made a part hereof.

17. Deliveries to Points Other Than Seller's Plant Terminals.

At the request of Buyer, Seller shall utilize its existing and available facilities for handling, metering and delivering the aviation gasoline purchased by Buyer to points (other than Seller's refinery at which the aviation gasoline was manufactured) designated by Buyer within the marketing area in the continental United States served by Seller, such service to be at the expense of Buyer and at Buyer's risk. In the event of Loss Seller shall make its rec-

Exhibit M—(Continued)

ords available to Buyer to prove the extent and value of such loss.

18. Operator Training.

Seller has arranged for the employment and training of such personnel as may be necessary and approved by Buyer for the efficient operation of the Defense Plant Facilities from and after the date of the notices given in accordance with subparagraph (a) of paragraph 2 hereof. Seller shall continue to conduct such approved operator training program at its own cost and expense. In the event this contract is cancelled by Buyer prior to the expiration of four months from the date on which oil is first charged to the last catalytic unit to be placed in operation for the purpose of making product or prior to October 1, 1944, whichever date is earlier, and such cancellation is for reasons other than the following: [80]

(a) A receiver or trustee is appointed for Seller or its property or Seller makes an assignment for the benefit of creditors or Seller becomes insolvent or a petition is filed by or against Seller pursuant to any of the provisions of the United States Bankruptcy Act, as amended, for the purpose of adjudicating Seller a bankrupt, or for the reorganization of Seller, or for the purpose of effecting a composition or rearrangement with Seller's creditors and any such petition filed against Seller is not dismissed within sixty (60) days; or

(b) Any breach or violation of any of the terms,

Exhibit M—(Continued)

conditions or covenants of this contract by Seller and the failure of Seller to cure such violation within thirty (30) days from the giving of a written notice thereof by Buyer to Seller;

Seller shall, upon such cancellation, submit to Buyer a statement of the cost of the approved operator training program. If upon such cancellation for reasons other than aforesaid, the total cost of the approved operator training program as shown by said statement is more than an amount equal to one half the total amount paid or payable by Buyer to Seller for "E" and "F" for operations prior to the date of such cancellation, Buyer shall, upon receipt of the statement aforesaid, pay to Seller the amount by which said approved operator training program exceeds one half of the total of the "E" and "F" payments computed as aforesaid; provided, however, the amount of the approved operator training program shall in no event exceed \$50,000 and provided further that in the event Seller operates any unit or units of the Defense Plant Facilities at any time during a period of six months following such cancellation (which Seller has a right to do pursuant to the provisions of the Amended Agreement of Lease) Seller shall, upon the commencement of any such operation repay to Buyer a fraction of the amount paid by Buyer to Seller pursuant to this paragraph the numerator of which fraction shall be the cost of training operators for the unit or units in question and the denominator of which shall be

Exhibit M—(Continued)

the total cost of training operators for the entire Defense Plant Facilities. [81]

The symbols "E" and "F" shall have the meanings defined in Appendix "B" attached hereto.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

DEFENSE SUPPLIES
CORPORATION

By /s/ H. A. MULLIGAN,
President.

Attest:

[Seal] /s/ GEORGE H. HUBERT,
Secretary.

WILSHIRE OIL COMPANY,
INC.,

By /s/ HEORGE L. MACHRIS,
President.

Attest:

[Seal] /s/ W. D. SMITH,
Asst. Secretary. [82]

EXHIBIT N

DEFENSE SUPPLIES - RICHFIELD
CONTRACT

(Watson Refinery—Second Contract)

Revised March 23, 1943

Contract made as of February 20, 1943, between Richfield Oil Corporation, a Delaware Corporation, having its principal business office at 555 South Flower Street, Los Angeles, California, hereinafter called Seller, and Defense Supplies Corporation, a corporation created by Reconstruction Finance Corporation, pursuant to Section 5 (d) of the Reconstruction Finance Corporation Act as amended, having its principal place of business at Washington, D. C., hereinafter called Buyer.

In consideration of the mutual agreements herein contained the parties agree as follows:

A certain contract made as of February 3, 1942, between the parties entitled "Contract between Defense Supplies Corporation and Richfield Oil Corporation" is hereby modified to the extent that it is inconsistent herewith and shall otherwise remain in full force and effect. Said certain contract will be referred to hereinafter as "the prior contract."

I. Expansion of Seller's Refining Facilities.

As of the date of the prior contract, Seller had existing facilities for the production at Watson, California, of approximately one thousand seven hundred (1,700) barrels per calendar day of 100

Exhibit N—(Continued)

octane aviation gasoline in accordance with Item 1 of Exhibit A hereof.

Seller has now recently completed an expansion of such facilities contemplated by the prior contract, to an extent which Seller originally estimated would enable it to produce approximately [83] three thousand and seven hundred fifty (3,750) barrels per calendar day of 100 octane aviation gasoline in accordance with Item 1 of Exhibit A hereof and which Seller currently estimates will enable it to produce approximately three thousand sixty-five (3,065) barrels per calendar day of 100 octane aviation gasoline in accordance with Item 3 of Exhibit A hereof.

Seller is willing to make an additional expansion of its facilities at an estimated cost of approximately Fourteen Million Three Hundred Seventy-five Thousand Dollars (\$14,375,000.00), which it is estimated will enable Seller to produce at Watson, California, a total of approximately ten thousand two hundred (10,200) barrels per calendar day of 100 octane aviation gasoline in accordance with Item 3 of Exhibit A hereof. Seller shall use its best efforts to expand said additional facilities and shall endeavor to maintain work on said expansion day and night in so far as the requisite labor and materials are available. Seller shall use its best efforts to complete such expansion as soon as possible and not later than March 1, 1944. The force majeure provisions set forth in Section X hereof shall apply in all respects to the expansion of facilities as well

Exhibit N—(Continued)

as to the sale of gasoline and all other obligations of Seller.

II. Sale and Storage of Products.

(a) When the aforesaid additional expansion of Seller's facilities shall be completed and ready for operation, Seller shall promptly notify Buyer; and from and after receipt of such notification Seller shall sell and deliver, and Buyer shall buy and receive, in accordance with provisions of this contract, two hundred twenty-five thousand (225,000) barrels per calendar month of 100 octane aviation gasoline which shall be in accordance with the specifications set forth in Exhibit A hereof or [84] any other specification which by mutual agreement shall be attached as an addendum to Exhibit A.

(b) Wherever in this contract provision is made for the sale and delivery to Buyer of a stated quantity of gasoline such quantity shall be an aggregate quantity of the various kinds of gasoline specified in Exhibit A collectively considered. Buyer may apportion such aggregate quantity among the various kinds of gasoline.

(c) Buyer on giving reasonable notice to Seller may require the delivery hereunder of 100 octane aviation gasoline of specifications other than those originally set forth in Exhibit A hereof which are capable of being produced with the same refining facilities and the same raw materials as are used in producing 100 octane aviation gasoline in accordance

Exhibit N—(Continued)

with the specifications originally set forth in Exhibit A hereof. The prices, specifications and quantities of such products shall be determined by negotiation between the parties, and Seller shall not be required to deliver such products unless and until an agreement has been reached. Such agreement shall be reduced to writing as an addendum to Exhibit A hereof.

(d) The term “barrel” as used in this contract means a barrel of forty-two (42) gallons. The term “gallon” means a United States gallon of two hundred and thirty-one (231) cubic inches.

(e) Seller shall maintain storage facilities at, or in the vicinity of, Watson, California, to accommodate at least three hundred thousand (300,000) barrels of 100 octane aviation gasoline. Subject to Section VIII hereof, Buyer shall order and take deliveries in such quantities as it may determine; provided, however, that whenever Seller’s above-specified storage facilities for said aviation gasoline shall be filled, [85] Seller shall not be obligated to produce any more of said gasoline for delivery to Buyer hereunder until Buyer shall have substantially reduced by purchase and removal the amount of gasoline in storage. If such full storage condition exists, Seller shall have the right to diminish the quantities otherwise to be delivered to Buyer by an amount equal to the amount of 100 octane aviation gasoline which was produced during such full storage condition. If, however, Seller shall produce during any

Exhibit N—(Continued)

such period of full storage any additional 100 octane aviation gasoline of the kind covered by this contract, then such additional aviation gasoline shall be treated as covered by Section III hereof. In accumulating said storage, Seller may store gasoline of the specifications last ordered by Buyer unless Buyer otherwise directs by written notice; and Buyer in ordering deliveries shall first order against the gasoline in storage; provided, however, that on Buyer's request and if Seller can do so without extra cost, Seller shall change the gasoline in storage to meet other specifications covered in Exhibit A hereof.

III. Optional Gasoline.

(a) Buyer shall also have the option from time to time and at any time to purchase all or any part of the 100 Octane aviation gasoline which Seller may produce between the effective date of the notification referred to in Section II (a) hereof and the expiration of this contract. Upon the exercise of such option Seller shall, subject to Section V (c) hereof, operate the facilities at full capacity or at least to an extent sufficient to satisfy Buyer's indicated requirements.

IV. Price and Payment.

(a) Prior to the effective date of the notification referred to in Section II (a) hereof, the base price of 100 [86] octane aviation gasoline, specified as Item 2 of Exhibit A hereof, shall be thirteen and

Exhibit N—(Continued)

one-quarter cents (0.1325) per gallon f.o.b. Seller's refinery at Watson, California, but said base price shall not apply from and after the effective date of the notification referred to in Section II (a) hereof.

(b) From and after the effective date of the notification referred to in Section II (a) hereof, the base price of 100 octane aviation gasoline in accordance with Item 3 of Exhibit A hereof purchased under the present contract and under the prior contract shall be thirteen and one-half cents (0.135) per gallon f.o.b. Seller's refinery at Watson, California.

(c) Seller represents that there has not been included in its computation of such prices any allowance for appreciation, amortization and obsolescence in excess of ten percent (10%) per annum of that portion of the original cost of its existing refining facilities used in the manufacture of said 100 octane aviation gasoline which is properly allocable to such manufacture, plus ten percent (10%) per annum of that portion of the original estimated cost of its proposed additional refining facilities to be used in the manufacture of said 100 octane aviation gasoline which is properly allocable to such manufacture. Nothing in the preceding sentence shall preclude Seller from using a different rate or rates for tax and accounting purposes.

(d) Buyer shall pay promptly, but not later than the twentieth (20th) day after the end of each calendar month, [87] all money due for gasoline de-

Exhibit N—(Continued)

livered to it by Seller during said month. On or before the tenth (10th) day of each calendar month, Seller shall render to Buyer a statement setting forth the quantity of aviation gasoline delivered during the preceding month, the price per gallon, and the total amount to be paid therefor. Copies of the certificates of inspection referred to in Section IX hereof shall accompany the aforesaid monthly statements.

V. Price Escalation.

The base prices of 100 octane aviation gasoline purchased under the present contract and under the prior contract shall be subject to adjustment, first, as provided in Exhibit B hereof, and second, as follows:

(a) The said base prices are based on a price of One Dollar and Eleven Cents (\$1.11) per barrel for twenty-six degree (26°) A.P.I. Signal Hill crude deliverable to Seller in the Signal Hill Field. The said prices shall be increased or decreased by a percentage equal to one-half the percentage increase or decrease in the average price paid for such crude over or under One Dollar and Eleven Cents (\$1.11) per barrel by the three (3) largest purchasers of such crude in the Signal Hill Field. The prices posted for such crude in the Signal Hill Field should constitute prima facie evidence of the prices paid by such purchasers.

(b) The base price for 100 octane aviation gaso-

Exhibit N—(Continued)

line set forth in Section IV (a) hereof shall also be increased or decreased by a percentage equal to one-half the percentage increase or decrease in the final monthly wholesale price Index [88] Number for "All Commodities other than Farm Products and Foods," as now published by the Bureau of Labor Statistics. United States Department of Labor, over or under the index figure of ninety-three and five-tenths (93.5) (the final index number used in the prior contract). The effective date of a change in price due to a change in the index number shall be the date of publication by the Bureau of Labor Statistics of the latest final monthly index number. If said index shall cease to be issued, the parties shall use such other index as may most closely approximate the discontinued one, and if they shall be unable to agree within ten (10) days after notice of such discontinuance as to the index to be substituted, the determination of the new index shall be made by arbitration under Section XI hereof.

(c) The base price for 100 octane aviation gasoline set forth in Section IV (b) hereof shall also be increased or decreased by a percentage equal to one-half the percentage increase or decrease over or under a calculated index figure which is the weighted average of three thousand sixty-five (3,065) barrels per calendar day at ninety-three and five-tenths (93.5) and seven thousand one hundred thirty-five (7,135) barrels per calendar day at ninety-five and eight-tenths (95.8) (the present final index number). The effective date of a change in price due

Exhibit N—(Continued)

to a change in the index number shall be the date of publication by the Bureau of Labor Statistics of the latest final monthly index number.

(d) The prices hereinabove set forth are based upon present normal methods of transporting petroleum raw materials to Seller's refinery at Watson, California, and upon [89] a normal operation of that refinery, in which substantial quantities of motor fuel and other products must necessarily be produced and sold in connection with the production of 100 octane aviation gasoline. If it becomes necessary to transport petroleum raw materials to said refinery by other than present normal methods thereby incurring additional costs of transportation, or if through an abnormal reduction of available markets for motor fuel and petroleum products other than 100 octane aviation gasoline, or if by reason of any cause or condition (whether or not of the same class or kind) resulting directly or indirectly from the existence of a state of war, the normal functioning of any refinery at which any portion of the 100 octane aviation gasoline supplied hereunder is manufactured shall be interfered with to such an extent that in the opinion of Seller the cost of refining 100 octane aviation gasoline is increased in respects other than those corrected by adjustment of the base price under the above paragraphs (a), (b), and (c), Seller may give notice to Buyer that the delivery of 100 octane aviation gasoline will be reduced in an amount sufficient in the judgment of Seller to offset the added cost of refining unless Buyer shall agree

Exhibit N—(Continued)

with Seller to increase the price paid for 100 octane aviation gasoline by an amount sufficient to offset such increased cost. If within ten (10) days after the date of mailing such notice Buyer advises Seller that it does not elect to take such reduced output and Buyer and Seller are unable to agree upon the amount of such increase in price within ten (10) days thereafter, Buyer may give notice to Seller that it desires to have the amount of such increase fixed by arbitration in accordance with Section XI hereof. The arbitrators to be chosen in this instance shall be persons who have had at least [90] ten (10) years' experience in the petroleum business and who are not connected with either of the parties hereto. The arbitrators shall be directed to make their findings as to the amount and effective date of such price increase within fifteen (15) days after the appointment of the last-appointed arbitrator and if no decision is reached by the arbitrators within such period, the production of 100 octane aviation gasoline by the refinery affected may be reduced as above provided.

(e) In making adjustments under this Section V, the prices to be adjusted shall be those prices in effect immediately prior to the adjustment and such adjustment shall be made regardless of what Seller's crude inventory may be at the time of such adjustment.

VI. Duration of Contract.

The original term of this contract shall expire at

Exhibit N—(Continued)

midnight on the last day of the last thirty-six (36) consecutive calendar months after the effective date of the notification referred to in Section II (a) hereof, but not later, in any event, than June 30, 1947. Buyer shall have the option to extend this contract for two (2) successive yearly periods beyond the original term by giving notice in writing to Seller of the exercise of such option at least ninety (90) days prior to the end of the original term for the first yearly extension and at least ninety (90) days prior to the end of the first yearly extension for the second yearly extension. Upon such extension the obligations to purchase and receive and the prices to be paid shall be fixed by agreement between the parties hereto during the ninety (90) day period prior to each such extension. [91] All of the other provisions of this contract except those not then applicable shall be in full force and effect. Section VI of the prior contract is hereby superseded and cancelled, except for the first sentence thereof.

VII. Advance on Account of Purchase of Gasoline.

(a) In addition to the advance payment provided for in the prior contract, Buyer shall make an advance payment to Seller on account of the purchase of 100 octane aviation gasoline under this contract in the amount of Ten Million Seven Hundred Eighty-one Thousand Two Hundred Forty-four Dollars (\$10,781,244.00) which shall be disbursed in monthly installments as the construction of the ex-

Exhibit N—(Continued)

panded facilities progresses. The first installment shall be disbursed in the amount of one-twelfth (1/12th) of said Ten Million Seven Hundred Eighty-one Thousand Two Hundred Forty-four Dollars (\$10,781,244.00) immediately following the expiration of ninety (90) days from the date of this contract or immediately following receipt of notice by Buyer from Seller of Seller's waiver of its right to terminate this contract under Section XVII hereof, whichever event shall first occur. The remaining installments shall be disbursed when Seller shall deliver to Buyer statements, showing only principal items, to certify that it has expended, or firmly committed itself to expend, on account of the construction of the additional expansion of facilities referred to in Section I hereof all of the funds theretofore advanced to it by Buyer and in addition has so expended, or firmly committed itself to expend, from its own funds not less than thirty-three and one-third percent (33-1/3%) of the aggregate of such installments advanced by Buyer. Buyer shall have the privilege of examining Seller's books to verify said [92] statements, but such verification shall not be a condition of payments by Buyer. If such examination shall lead to any disagreement, it shall be settled by arbitration under Section XI hereof.

(b) From the amount due Seller for deliveries of 100 octane aviation gasoline for each of the first thirty-six (36) full calendar months following receipt by Buyer of Seller's notification of completion

Exhibit N—(Continued)

of the additional expansion of facilities referred to in Section I hereof, Buyer shall deduct and retain the sum of:

(1) one thirty-sixth ($1/36$ ths) of the above advance payment, and

(2) interest at the rate of two percent (2%) per annum on outstanding balances of such advance payment accruing subsequent to the date of receipt by Buyer of Seller's notification of completion of said additional expansion of facilities;

provided that Buyer shall also deduct and retain, with respect to each of the first twelve (12) full calendar months after the date of receipt of such notification of completion the sum of:

(1) one-twelfth ($1/12$ th) of the amount of interest at the rate of two percent (2%) per annum on the outstanding balances of such advance payment accrued prior to and including the date of receipt by Buyer of Seller's notification of completion of said additional expansion of facilities; and

(2) one-twelfth ($1/12$ th) of the account of the [93] credit, if any, referred to in paragraph (c) of this Section VII.

The above deductions, plus the deductions under the provisions of Section VII of the prior contract accruing subsequent to the effective date referred to in

Exhibit N—(Continued)

Section II (a) hereof, shall be considered as payment for the first purchases by Buyer in each of the first thirty-six (36) full calendar months following the effective date of the notification referred to in Section II (a) hereof.

(c) If, by reason of delay in the completion of the expanded facilities, the effective date of the notification referred to in Section II (a) hereof shall not be at least thirty-six (36) months prior to June 30, 1947, then Seller shall repay to Buyer one thirty-sixth ($1/36$ th) of the principal amount of the advance payment for each month or fraction thereof by which the effective date of said notification is subsequent to July 1, 1944, such repayment to be credited against any purchases by Buyer of 100 Octane aviation gasoline hereunder delivered during each of the twelve (12) full calendar months following the effective date of said notification; provided, however, that not more than one-twelfth ($1/12$ th) of such credit shall be taken in each of said twelve (12) full calendar months; and provided further that any such repayment not made as provided above or in paragraph (d) of this Section VII shall be made by Seller to Buyer in cash on expiration of the original term of this contract.

(d) In the event of Seller's failure to deliver sufficient 100 octane aviation gasoline hereunder following the effective date of the notification referred to in Section II (a) hereof, due to reasons other than the force majeure reasons [94] referred to in Section

Exhibit N—(Continued)

X hereof, to permit Buyer to recoup in any month the monthly repayment installment as provided in paragraph (b) of this Section VII, the unrecouped portion of the monthly repayment installment as aforesaid shall be repaid immediately by Seller to Buyer in cash; but if such failure was due to such force majeure reason then the repayment period provided in paragraphs (b) and (c) of this Section VII shall be extended one month for each month in which such failure due to such force majeure reason occurred.

VIII. Liquidated Damages and Limitation of Liability.

(a) The parties mutually agree that the Seller would be seriously damaged in the event that Buyer should breach its obligation to take that minimum quantity of 100 octane aviation gasoline herein agreed upon and that the liquidated damages herein provided for are not in the nature of a penalty or forfeiture and that they reflect allowance for the possible cessation of war prior to the expiration of the original term of the contract. If Buyer shall fail to purchase sufficient 100 octane aviation gasoline in any one full calendar month following the effective date of the notification referred to in Section II (a) hereof to liquidate the total of the monthly repayment installments under this contract and the prior contract (determined as provided in paragraphs (b) and (c) of Section VII hereof and in paragraphs (b) and (c) of Section VII of the

Exhibit N—(Continued)

prior contract), Buyer shall have the privilege to deduct and retain from amounts owing to Seller for purchases of 100 octane aviation gasoline during the next succeeding month, over and above amounts sufficient to liquidate the regular monthly repayment [95] installments for such month, an amount up to the unrecouped portion of the monthly repayment installments for the preceding month. If Buyer so fails to make recoupment, as aforesaid, during such succeeding month, then Seller shall, upon the expiration of such month, be entitled to retain as liquidated damages such unrecouped amount plus interest at the rate of two percent (2%) per annum on such unrecouped amount computed from the first (1st) day of the preceding month.

(b) The foregoing liquidated damages and the liquidated damages provided in Section VIII of the prior contract relate solely to a default by Buyer in not purchasing the stipulated quantities and there shall be no other damages for any failure by Buyer to take the quantities stipulated in Section II (a) of the prior contract and Section II (a) of the present contract. Damages for any other default by Buyer and for any default by Seller shall be determined by arbitration under Section XI hereof.

IX. Deliveries and Inspections.

(a) Seller warrants full and unencumbered title to all gasoline delivered under this contract. Title to said gasoline, and risk of loss in respect thereof, shall pass from Seller to Buyer upon delivery of the

Exhibit N—(Continued)

gasoline at the intake pipe of the means of transportation, f.o.b. Seller's refinery at Watson, California.

(b) Buyer shall take delivery of said gasoline in tankers, barges, tank cars, or tank trucks (tank truck deliveries to be not in excess of Seller's capacity for loading tank trucks and tank car deliveries not to be in excess of two thousand [96] (2,000) barrels in any one day) all to be supplied by Buyer at its own cost and expense.

(c) Buyer shall give notice to Seller as far in advance as practicable, and in no case less than forty-eight (48) hours, of the arrival of each tanker or barge and of the quantity of and specifications of the gasoline to be loaded. Seller shall furnish without cost to Buyer berth at which each vessel may safely lie afloat together with all connections and facilities for loading, and shall load the product on board. Deliveries shall be made in accordance with the delivery conditions at each loading point which currently are in effect with respect to deliveries made at such point to other customers.

(d) Seller shall furnish certificates of inspection, by a licensed inspector satisfactory to the parties which shall set forth the quantity and quality of each shipment of gasoline. Inspection shall be based on samples taken from Seller's storage tanks from which the product is delivered. The certificates of inspection shall be issued in five counterparts, one set of which shall accompany the relative shipment,

Exhibit N—(Continued)

one of which shall be forwarded forthwith to Buyer, a third submitted to Buyer with the monthly statement required by Section IV hereof, a fourth set of which shall be delivered forthwith to Seller, and a fifth set of which shall be delivered forthwith to the authorized officer or employee of the War Department or Navy Department referred to in paragraph (1) of this Section IX. Buyer may, at its option, waive the requirements of inspection by a licensed inspector, and in such event, and in case of shipments made from points (other than refineries) where no licensed inspector [97] is available, Seller shall furnish its own certificates of inspection, which certificate shall be controlling.

(e) Inspection as to quantity of delivery into vessels shall be made by taking the temperature and measuring and gauging the product in the shore tanks from which delivery is made immediately before and immediately after loading. Inspection as to quantity of delivery into tank cars and tank trucks shall be made in accordance with the accepted practices of the trade. Adjustment in volume to a sixty degree Fahrenheit (60°F.) basis shall be made in accordance with the correction tables of the United States Bureau of Standards prevailing at the time of delivery except in case of deliveries of quantities less than four thousand (4,000) gallons into tank wagons, in which case no adjustment shall be made.

(f) Inspection as to quality shall be made accord-

Exhibit N—(Continued)

ing to the latest standard or tentative standard methods of the American Society for Testing Materials, wherever applicable, and the product shall conform as to quality with the specifications set forth in Exhibit A hereof.

(g) The cost of product inspection shall be paid by Seller and billed separately to Buyer, which shall pay such cost, except when Seller's inspection is accepted in which case Seller shall assume the cost of its own inspection.

(h) The certificates of inspection of quantity and quality shall be accepted by Buyer and Seller as conclusive for invoice, payment, and all other purposes of this contract.

(i) Should any such certificate indicate a failure of the product shipped to conform completely to the specifications of quality, Buyer may nevertheless accept such product and claim an adjustment for such deficiency; provided, that in [98] the event that such a claim is made Seller shall be notified and given an opportunity to inspect said shipment within five (5) days after arrival at destination but in any event before unloading.

(j) Upon request by Buyer, Seller shall make deliveries of 100 octane aviation gasoline under this contract in appropriate limited quantities to points where Seller may be currently engaged in making deliveries of aviation gasoline in the ordinary course of its business. The delivery costs shall be paid by Buyer and are to be mutually agreed upon.

Exhibit N—(Continued)

(k) Seller shall not be obligated to procure the 100 octane gasoline to be delivered hereunder from any source other than its Watson, California, refinery.

(1) Until further notice from Buyer to Seller, for the purposes of this Section IX any officer or employee of the War Department or Navy Department who is properly authorized to accept deliveries of gasoline for his Department is hereby nominated as agent for Buyer and authorized to take delivery of aviation gasoline hereunder, to waive the aforesaid requirements of inspection by a licensed inspector, and to receipt on behalf of Buyer, in a manner approved by Buyer, for deliveries of such aviation gasoline from Seller to Buyer.

X. Force Majeure.

Seller shall not be liable for delays or defaults in its performance under this contract due to causes beyond its control and without its fault or negligence, including, but not restricted to, acts or requests of the Government, or of any Governmental officer or agent purporting to act under authority, floods, fires, epidemics, quarantine restrictions, strikes, freight embargoes and failures, exhaustion or unavailability, or [99] delays in delivery, of any product, service or material necessary in the expansion of the facilities contemplated by Section I hereof, or in the manufacture and delivery of aviation gasoline deliverable hereunder, including crude oil,

Exhibit N—(Continued)

supplies, raw materials, ingredients and lead tetra-ethyl.

XI. Arbitration.

In case of any disagreement between Buyer and Seller as to any right, obligation, term, or provisions of this contract, including any disagreement as to the price to be paid for gasoline to be delivered hereunder, the parties shall make an earnest effort to settle such disagreement to their mutual satisfaction. If such effort be unsuccessful, then either party may cause such disagreement to be submitted for determination by arbitrators by giving to the other party a notice in writing or by telegraph to that effect and giving the name of the arbitrator chosen by the party giving the notice. Within five (5) days after receipt of such notice of arbitration, the other shall, in writing or by telegraph, name the arbitrator chosen by such party, and within five (5) days after the appointment of the second arbitrator, an additional arbitrator shall be selected by the two (2) arbitrators theretofore appointed, provided, however, if one of the parties shall have failed to appoint an arbitrator as hereinbefore provided, the sole arbitrator shall arbitrate the disagreement alone. If two (2) arbitrators shall have been appointed as aforesaid and shall have failed to select an additional arbitrator within the above stated time, the additional arbitrator shall be appointed by the person who at the time is the Senior Judge of the United States Circuit Court of Appeals for the

Exhibit N—(Continued)

Ninth Circuit, acting in his individual and not judicial capacity, upon application therefore by either of the parties. The decision of [100] a majority of the arbitrators so appointed, or if either party shall have failed to appoint an arbitrator as aforesaid, the decision of the sole arbitrator shall be final and binding on the parties for all purposes. Each party shall pay the cost and expenses of the arbitrator appointed by such party, and the other costs and expenses of the arbitration, including the cost and expenses of the additional arbitrator, shall be paid by the party to the arbitration whose claim is not sustained or if partially sustained the costs shall be apportioned. Pending such determination of every disagreement as to the price to be paid for gasoline delivered hereunder, Buyer shall, upon contesting any price claimed by Seller to be due, pay the price which Buyer alleges to be due and shall immediately upon such determination pay any balance found by mutual agreement or by said arbitrators to be due.

XII. Taxes.

(a) Buyer shall pay in addition to the prices as established in Sections IV and V hereof, any new or additional taxes, fees, or charges, other than income, excess profits, or corporate franchise taxes, which Seller may be required by any municipal, state, or federal law in the United States or any foreign country to collect or pay by reason of the production, manufacture, sale or delivery of the commodities delivered hereunder. Buyer shall also

Exhibit N—(Continued)

pay any such taxes on crude petroleum, or the transportation thereof, to the extent such taxes result in increased cost of the commodities delivered hereunder not compensated for by Section V hereof.

(b) Buyer shall also pay in addition to the prices as established in Section IV and V hereof, any now existing taxes, [101] fees, or charges measured by the volume or sales price of the aviation gasoline delivered hereunder, imposed upon Seller by reason of the production, manufacture, storage, sale or delivery of such gasoline, unless Buyer or Seller is entitled to exemption from a given tax, fee or charge by virtue of Buyer's governmental status; it being understood that Buyer now believes that both Buyer and Seller are entitled to such exemption. Seller represents that the taxes, fees and charges referred to in this paragraph have not been included in its computation of costs on which the prices set forth in Section IV hereof are based.

(c) If in any case the parties cannot agree on the question as to whether or not Buyer or Seller is entitled to exemption from a given tax, fee or charge by virtue of Buyer's governmental status, the burden shall be upon Buyer to obtain a ruling in writing from a duly constituted and authorized governmental tax authority as to such exemption. Until such ruling is obtained Buyer shall pay the amount of the tax to Seller or to the appropriate tax collecting agency or make satisfactory arrangements with such tax collecting agency.

Exhibit N—(Continued)

(d) Any addition of taxes to the prices as established in Sections IV and V hereof shall not be considered in arriving at the value of the gasoline delivered hereunder in connection with those portions of the contract referring to liquidated damages, repayment of advance or recoupment of advance, and such taxes shall be shown separately and be in addition to the price.

XIII. Notices.

Any notice to be given hereunder shall be in writing [102] and may be personally delivered or sent by cable, telegram or registered mail to the party for whom intended at the address of such party as specified above. A notice personally delivered to either party must be personally delivered to an officer or manager thereof. Notice by registered mail shall be deemed to have been given at the expiration of that time after mailing which is normally required by the postal authorities to make delivery. Cabled or telegraphed notice shall be deemed given the day after sending the cable or telegram. Each party shall immediately send to the other by regular mail confirming copies of any notices sent by cable, telegraph or air mail. Either party may by notice as aforesaid change its address for notices thereafter.

XIV. Entirety of Contract.

This instrument contains the entire agreement between the parties in respect of the subject matter

Exhibit N—(Continued)

and there are no conditions, warranties, representations or stipulations relating thereto which are not merged herein. The right of either party to require strict performance shall not be affected by any previous waiver or course of dealing, unless such waiver be in writing signed by an officer or other duly authorized person and specify a duration sufficient in time to embrace the matter in question. No modification shall be binding unless in writing and signed by officers of the parties. Authorization or ratification by the boards of directors of the parties shall not be required in respect of modifications.

XV. Assignability.

This contract shall be binding upon, and shall inure to the benefit of, the successors and assigns of the respective [103] parties hereto; provided, however, neither party shall have the right to assign this contract without the written consent of the other party, except that Buyer may assign to any other government-owned corporation in which event Buyer shall remain liable.

XVI. Statutory Compliance.

(a) In carrying out this contract Seller agrees to comply with, and give all stipulations and representations required by applicable Federal laws and further agrees to require such compliances, representations, and stipulations with respect to any contract entered into by it with others incidental to or in connection with this contract as may be required

Exhibit N—(Continued)

by applicable Federal laws; and notwithstanding the generality of the foregoing, Seller further agrees that in the performance of this contract it will not discriminate against any worker because of race, creed, color or national origin.

(b) Seller is a corporation and this contract is made with it for its general benefit and no Member of, or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom in violation of the law of the United States covering such matters.

XVII. Right to Terminate.

Seller shall have the right to terminate this contract within ninety (90) days of the date thereof, unless within said ninety (90) days it shall receive all governmental assistance which is available or necessary for the prompt completion of the expanded facilities which Seller will erect and install hereunder, including, without limitation, priorities and allocations necessary [104] for obtaining materials, equipment, supplies and crude petroleum, and assurances from the Treasury Department, in the form of closing agreements, that the advance payment provided for in Section VII hereof, or any part thereof, will not be treated as taxable income upon receipt by Seller, but that the ratable portions thereof will be treated as amounts received for products supplied, when and as such ratable portions are credited for that purpose hereunder. Failure so to

Exhibit N—(Continued)

terminate shall not constitute a waiver of any other rights of Seller,

In Witness Whereof, the parties hereto have executed this contract as of the date and year first above written.

DEFENSE SUPPLIES
CORPORATION,

By /s/ H. A. MULLIGAN,
President.

Attest:

/s/ H. H. TURNER,
Secretary.

RICHFIELD OIL COR-
PORATION,

[Seal] /s/ CHAS. S. JONES,
President.

Attest:

[Seal] /s/ C. B. BONNER,
Secretary. [105]

EXHIBIT O

Rubber Reserve Company
Washington, D. C.

Gentlemen :

Rubber Reserve Company now has, and expects from time to time to have, on hand at its various styrene plants quantities of ethylbenzene, in excess of its own requirements, which it is willing to make available to your Company and others engaged in producing 100-octane gasoline for sale to Defense Supplies Corporation.

Accordingly, at the request of the Petroleum Administrator for War, and until further written notice, Rubber Reserve Company (hereinafter called "Seller") hereby proposes to sell to your Company (hereinafter called "Buyer") such quantities of ethylbenzene as Buyer may request in the following manner, and subject to the following terms and conditions:

1. The purchase price of all ethylbenzene sold and delivered to Buyer hereunder shall be 96c per gallon, f.o.b. Seller's producing plant, the payment of such price to be discharged in the manner provided by paragraph 7 hereof.

2. All ethylbenzene sold hereunder shall be of a grade and quality suitable for use as a substitute for cumene in the production of 100-octane gasoline for sale to Defense Supplies Corporation.

3. Seller shall be the sole judge of the quantity, if any, of ethylbenzene in excess of its own require-

ments which shall be available from time to time for sale hereunder, and shall have the right to apportion the available quantity, in any manner it chooses, among any or all of the companies referred to in the first paragraph hereof.

4. Buyer shall issue and forward to the Administration Division, Rubber Reserve Company, Washington 25, D. C., purchase orders in triplicate covering the quantity of ethylbenzene which it desires to purchase from time to time. Said purchase orders shall incorporate by reference the provisions of this letter which shall supersede any conflicting provisions contained in said purchase orders, and such purchase order shall constitute a separate agreement for the purchase and sale of the quantity of ethylbenzene indicated therein.

5. Title to all ethylbenzene sold hereunder shall pass to Buyer upon delivery to the custody of the carrier designated in Buyer's purchase order. Buyer shall issue appropriate shipping [106] instructions to Seller, but it is understood that it shall be the responsibility of Buyer to furnish all tank cars, truck tanks, tankers, barges or other containers necessary for shipments hereunder.

6. All shipments shall be corrected to volume at 60°F., with a temperature correction factor of .0005 per degree Fahrenheit. Barge and tanker shipments shall be measured by commercial inspectors engaged by Seller at Buyer's expense unless such inspection is expressly waived by the Buyer, in which case Seller's measurement shall control. Rail or truck

shipments shall be measured on the basis of volume in cars or trucks.

7. In full consideration for the sale and delivery of all ethlybenzene purchased hereunder, the obligations of Buyer shall be as follows:

(a) Buyer shall make payment to Seller of the amount of 17c per gallon within thirty (30) days after the date of shipment;

(b) Buyer shall file with Defense Supplies Corporation appropriate claims for reimbursement with respect to all aviation gasoline produced by Buyer containing ethlybenzene sold and delivered to Buyer hereunder, each such claim to reflect the delivered cost of such ethlybenzene based upon the price specified herein of 96c per gallon, f.o.b. the producing plant, and each such claim to be accompanied by an appropriate notation identifying the portion thereof reflecting such ethylbenzene cost with an appropriate sub-division reflecting separately and identifying the amount which is the subject of the assignment required by subparagraph (c) hereof; it being understood that such claim will be so submitted to Defense Supplies Corporation in pursuance of the provisions of the existing contract between Buyer and Defense Supplies Corporation covering the purchase of aviation gasoline;

(c) Buyer, by the submission of the related purchase order as hereinabove provided, shall be deemed to have assigned and agreed to assign to Seller, but only to the extent of that portion represented by the difference between 96c and 17c per

gallon of ethylbenzene covered thereby, any and all claims filed or required to be filed by Buyer under the [107] provisions of subparagraph (b) hereof, with the right in Seller to reassign such claims to Defense Supplies Corporation or to any other Agency of the U. S. Government; and for the foregoing purposes, Buyer likewise shall be deemed to have authorized and directed Defense Supplies Corporation to remit to Seller, or to its assignee, but only to the extent aforesaid, the amounts of any and all such claims; and

(d) In the event that the net amount of any claim filed by Buyer under the provisions of subparagraph (b) hereof is less than the amount obtained by multiplying by 79c the number of gallons of ethylbenzene covered by such claim, Buyer shall, at the time such claim is so filed, forthwith remit to Seller the amount of such difference. In the further event that the net amount of any such claim is allowed by Defense Supplies Corporation (upon the advice of the Petroleum Administrator for War) is less than the amount obtained by multiplying by 79c the number of gallons of ethylbenzene covered by such claim, then Buyer shall, at the time such claim is allowed, remit to Seller the amount of such difference less any amount previously remitted to Seller with respect to such claim pursuant to the first sentence of this subparagraph (d); provided, however, that to the extent such latter difference is attributable to a reduction by Defense Supplies Corporation (upon the advice of the Petroleum Administrator for War in the allowance for the price of ethylbenzene as

reflected in such claim as so filed, Buyer shall be relieved of the obligation to make such latter remittance;

it being understood that upon performance by Buyer of all of the obligations set forth in the foregoing subparagraphs (a), (b), (c), and (d), Buyer shall have no further obligation with respect to any ethylbenzene sold and delivered to Buyer hereunder.

8. Buyer warrants that all ethylbenzene purchased hereunder shall be used by Buyer solely in the production of 100-octane gasoline, or components thereof, for sale to Defense Supplies Corporation, or its nominee, except as otherwise authorized by Defense Supplies Corporation.

9. It is understood that, since no tax is included in the purchase price, Buyer will reimburse Seller for all taxes which Seller may be required to pay in connection with any sale hereunder.

10. No member of or delegate to the Congress of the United States shall be admitted to any share or part of this arrangement, or to any benefit arising therefrom, but this provision shall not be construed to extend to this [108] arrangement if made with a corporation for its general benefit. Buyer shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

To facilitate an orderly scheduling of the production of the ethylbenzene to be sold hereunder, it is requested that purchase orders be forwarded as soon

in advance of the desired shipping date as possible. Every effort will be made to fill orders from plants situated nearest to destination, but no representation is made that any order shall be so filled.

It is intended that the foregoing proposal shall supersede the one relating to the same subject which was set forth in Rubber Reserve Company's letter of June 22, 1944.

Very truly yours,

RUBBER RESERVE COMPANY,

By

Its..... [109]

EXHIBIT P

AGREEMENT

Whereas, at the request of War Department, Navy Department, and Petroleum Administration for War (hereinafter called Army, Navy, and PAW, respectively), Defense Supplies Corporation (hereinafter called DSC) has entered into contracts under which it has agreed to purchase from various refiners quantities of aviation gasoline commonly referred to as "100 octane aviation gasoline" (hereinafter called gasoline, except as otherwise specifically indicated), and has or will have options to cause certain additional gasoline to be manufactured and sold to it, the grades and specifications of said gasoline to be approved from time to time by the Aeronautical Board and administered by PAW; and

Whereas, it is contemplated that DSC, pursuant to recommendation by PAW, will enter into additional contracts for the purchase of gasoline to the end that substantially the entire available production thereof will be under contract to DSC; and

Whereas, the parties intend that supplies of gasoline shall be made available only to Army, Navy (acting for itself and for Lend-Lease Administration), and certain other approved purchasers pursuant to allocation by the Aviation Petroleum Products Allocations Committee (an existing committee, hereinafter called APPAC, comprising representatives of Army, Navy, PAW, and the British Government); and

Whereas, the parties hereto did on December 19, 1942, execute an agreement establishing a procedure under which gasoline was to be purchased by DSC and to be sold to Army and Navy and other approved purchasers, said agreement being effective from January 1, 1943, through June 30, 1943; and

Whereas, it is deemed necessary, for the effective prosecution of the war, to continue that procedure, with certain modifications, for a further period; and

Whereas, the parties desire that any money balances due Army and Navy in accordance with the aforesaid agreement of December 19, 1942, as of the date of its expiration be applied to the purchase by Army and Navy of gasoline under this agreement;

Now Therefore, It is agreed by Army, Navy, PAW, and DSC, as follows:

1. Any money balances due Army and Navy from DSC as of June 30, 1943, in accordance with paragraph 1 of the agreement of December 19, 1942, referred to above shall be retained by DSC as advances against the purchase price to Army and Navy, respectively, of gasoline to be sold and delivered to them by DSC during the period July 1, 1943, through June 30, 1944, hereunder. Adjustments in the amount of such advances may be made during the effective period of this agreement with the mutual approval of (1) DSC and the Contracting Officer, Materiel Command, Army Air Forces, Wright Field, Dayton, Ohio, in the case of Army; or (2) DSC and the Paymaster General, Navy Department, Washington, D. C., in the case of Navy. Upon expiration or termination of this agreement any unliquidated balances of such advances from Army and Navy shall be applied respectively against any payments then due DSC from Army and Navy for the sale and delivery to them by DSC of gasoline hereunder and the remaining balances, if any, shall be repaid by DSC to Army and/or Navy as the case may be.

2. DSC appoints Army and Navy, or either of them, through their proper officers or employees, its agents to accept for its account deliveries of all gasoline, to receipt on behalf of DSC for the same, and to redeliver all or part thereof in accordance with the provisions of this agreement. As used herein, "proper officers or employees" are defined as any officer or employee of Army or Navy who is properly authorized to accept deliveries of gasoline for his Department. [111]

3. Purchase of gasoline from DSC will be subject, as to quantity and end user, to determinations and allocations of APPAC and, as to refinery source, to release by PAW. Army and Navy may purchase and accept delivery of gasoline from DSC at such refineries in quantities no greater than those allocated by APPAC. Army and Navy reserve the right to purchase gasoline from DSC for delivery to purchasers or consumers other than Army and Navy.

4. When, from time to time, Army or Navy wishes to provide for delivery of all or part of the gasoline allocated to it, at points other than the refinery of manufacture, such gasoline shall be resold by DSC to any refiner or distributor designated by Army or Navy for distribution and sale to them at the required destination. Sales by DSC to such refiners or distributors shall be made at the prices established in accordance with paragraph 11 of this agreement, and, except for refiners having contracts with DSC for the purchase and sale of gasoline manufactured by them, shall be for cash at the option of DSC.

5. Where gasoline has been allocated by APPAC for delivery to consumers other than those named in this agreement, any refiner having a contract with DSC for the purchase and sale of gasoline may purchase from DSC, at the prices established in accordance with paragraph 11 of this agreement, the gasoline so allocated, for delivery to such other consumers or to their designated suppliers.

6. Deliveries to Army, Navy, refiners or distributors made in accordance with paragraphs 3, 4 and 5

above shall take effect immediately after acceptance of delivery for the account of DSC in accordance with paragraph 2 above. Receipts in the form attached hereto as Exhibit A (or any approved revision thereof) shall be issued indicating delivery to and redelivery from DSC. [112]

7. Delivery of gasoline and passage of title from DSC to Army or Navy at the refinery will be considered as having been made when gasoline passes through the intake pipe of a vessel, when a loaded tank car is turned over to a railroad company, or when loading of a truck is completed, as the case may be. Title to gasoline being resold to refiners or distributors in accordance with paragraphs 4 and 5 above will pass to them on the issuance in their behalf to DSC of the receipts provided for in paragraph 6 above.

8. Army and Navy assume responsibility for scheduling deliveries of all gasoline purchased by them from DSC. All arrangements for transportation and for the furnishing of transportation facilities will be made by Army, Navy, refiners or distributors for the gasoline redelivered to each in accordance with paragraphs 3, 4 and 5 above. DSC will not be liable for the payment of any transportation charges for moving gasoline. Such charges will be borne by Army and Navy or by customers purchasing gasoline from them or from refiners or distributors since all deliveries to and by DSC will be made at the refineries as provided in paragraph 7 hereof. Army and Navy are hereby authorized by

DSC to take advantage of provisions of contracts between DSC and refiners for utilization of refiners' delivery facilities and services.

9. For all gasoline purchased by them from DSC, Army or Navy, as the case may be, will give all notices of delivery required of DSC by the various contracts.

10. DSC, Army and Navy agree that the Certificates of Inspection of quantity and quality of each shipment to Army and Navy issued by a licensed inspector satisfactory to DSC shall be acceptable for invoicing and payment. The Certificate of Inspection and the Receipt (Exhibit A) will be prepared in five counterparts and distributed as follows: [113]

One set will accompany the shipment.

One set will be forwarded to DSC.

One set will accompany a monthly statement mailed to DSC showing all gasoline delivered during the preceding month.

One set will be delivered to the seller.

One set will be delivered to the Air Service Command, Army Air Forces, Attention Fuels and Lubricants Branch, Patterson Field, Fairfield, Ohio, or to the Fuel Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., as the case may be.

DSC will waive the requirement that a licensed inspector inspect the gasoline and issue a Certificate of Inspection provided that an authorized inspector

or other authorized employee of Army or Navy accepts delivery and provided further that, upon acceptance of the gasoline under these circumstances, the authorized inspector or authorized employee issues a signed statement to DSC with respect to each shipment so accepted indicating that the requirement for the inspection and Certificate of Inspection by a licensed inspector has been waived by him. The receipt attached as Exhibit A will be acceptable for this purpose.

11. The prices per gallon to be charged by DSC for gasoline sold by it (whether to Army or to Navy, or to others) shall be determined as follows:

(a) For purposes of price determination under this agreement and renewals thereof the year shall be divided into quarters commencing the first day of January, April, July and October.

(b) For the quarter beginning July 1, 1943, prices for gasoline of the several grades sold shall be established by PAW not less than thirty days before the beginning of the quarter, based upon estimates sufficient to reimburse DSC for the cost of the gasoline, out-of-pocket expenses attributable to the gasoline program (including cost of inspection, maintenance of field auditors, etc.), extraordinary expenses as set forth in paragraph 13, and costs of DSC in administering the gasoline program not to exceed 1/200 of one cent per gallon. [114]

(c) For each succeeding quarter, prices for gasoline of the several grades sold shall be established not less than 30 days before the beginning of such

quarter in accordance with subparagraph (b) above, except that in addition to the factors mentioned in subparagraph (b), adjustments shall be made to compensate for differences, if any, found to exist between the actual costs for any preceding quarter (including quarters for which the aforesaid agreement of December 19, 1942, was in effect) and the estimates for that quarter.

(d) The prices established as aforesaid for each quarter shall be final, and not subject to further adjustment, and shall apply to all gasoline sold by DSC during such quarter.

(e) At the request of Army or Navy, but not more frequently than once during each quarter, DSC shall examine the expenses it has incurred in administering the gasoline program (estimating overhead and other indeterminables) and shall make such adjustment in its charge of $1/200$ of one cent per gallon as will approximate actual expenses and as may be agreed upon between the parties hereto.

12. Gasoline sold by DSC to refiners or distributors for delivery to Army, Navy and other customers in accordance with paragraphs 4 and 5 hereof shall be resold by the refiners or distributors at a price not to exceed the price paid by them to DSC, plus such delivery and service charges and applicable taxes (if any) as are agreed upon by the refiners or distributors and Army, Navy or such other customers.

13. Pending negotiation of contracts between the refiners and DSC to provide for the delivery of gaso-

line of specifications other than those set forth in existing contracts, it is agreed that extraordinary expenses incurred by the refiners pursuant to authorization of PAW will be interpreted to include additional costs, [115] if any, incurred by refiners resulting from any change in specifications of gasoline authorized by PAW. DSC will pay refiners for all extraordinary expenses approved by PAW, including those resulting from a change in specifications authorized by PAW, in accordance with the "Memorandum of Understanding on Plan to Reimburse Manufacturers of 91 Octane and Higher Aviation Gasoline for Losses Incurred in Following Office of Petroleum Coordinator Recommendations" dated July 24, 1942, copy of which is attached as Exhibit B, or any amendment or revision thereof as may from time to time be effective upon the agreement of the parties hereto. DSC shall submit reports to Army and Navy showing actual amounts of extraordinary expenses as approved by PAW and paid by DSC.

14. Payments to refiners by DSC, exclusive of reimbursement for extraordinary expenses, will be made at the time specified in, and in accordance with, the terms of the several contracts between DSC and the refiners.

15. Deliveries of all gasoline hereunder shall be made only in accordance with allocations of APPAC, notice of which shall be communicated to the parties concerned by PAW. Any applications received by DSC from commercial customers for gasoline shall

be referred to PAW for transmittal to and consideration by APPAC.

16. Penalties, if any, which may be imposed upon DSC for failure to accept deliveries of gasoline under the several contracts between it and the refiners shall be repaid to DSC by Army or Navy if the penalties are the proximate result of omission or failure of Army or Navy, as the case may be.

17. DSC may at the request of Army, Navy, and PAW enter into contracts for the purchase of "87 octane aviation gasoline" and "91 octane aviation gasoline". If and when such contracts are entered into, the parties hereto may, by a supplemental agreement, extend the procedure hereinabove established to apply to such "87 octane aviation gasoline" and "91 octane aviation [116] gasoline" as may be purchased by DSC pursuant to such contracts.

18. This agreement shall be effective during the period from July 1, 1943, to June 30, 1944 (both inclusive) unless otherwise sooner terminated by mutual agreement of the parties hereto, and shall upon becoming effective wholly supersede the aforesaid agreement dated December 19, 1942.

Executed as of May 20, 1943.

DEFENSE SUPPLIES
CORPORATION,

/s/ H. A. MULLIGAN,
President.

PETROLEUM ADMINISTRATION FOR WAR,

/s/ R. K. DAVIES,
Deputy Administrator.

WAR DEPARTMENT,

/s/ ROBERT P. PATTERSON,
Under Secretary of War.

NAVY DEPARTMENT,

/s/ JAMES FORRESTAL,
Under Secretary of the Navy.

EXHIBIT Q

AGREEMENT

Whereas, at the request of the War Department, Navy Department, and the Petroleum Administration for War, Defense Supplies Corporation has entered into contracts under which it has agreed to purchase from various refiners quantities of aviation gasoline commonly referred to as "100 octane aviation gasoline" (hereinafter referred to as "gasoline" except as otherwise specifically indicated), the specifications of said gasoline to be determined from time to time by the Aeronautical Board; and

Whereas, it is contemplated that Defense Supplies Corporation, pursuant to recommendation by the Petroleum Administration for War, will enter into additional contracts for the purchase of this product to the end that substantially the entire pro-

duction will be under contract to the Corporation; and

Whereas, such supplies of gasoline are to be made available only to the War Department, Navy Department (acting for itself and for Lend-Lease Administration), and certain other consumers pursuant to allocation by the "Allocations Committee" as hereinafter defined; and

Whereas, it appears desirable to establish a procedure under which such supplies will be received by Defense Supplies Corporation and made available to the War Department, Navy Department, and the other consumers;

Now Therefore, It is agreed by the War Department, Navy Department, Petroleum Administration for War, and Defense Supplies Corporation, as follows:

1. The War Department will advance to Defense Supplies Corporation \$34,000,000 and the Navy Department will advance to Defense Supplies Corporation \$66,000,000, which funds are estimated to be equivalent to 50% of the cost, including extraordinary expenses, of gasoline to be delivered to those Departments during the six-month period from January 1, 1943, through June 30, 1943. Adjustments in the amount of such advanced funds may be made during the effective period of this agreement with the mutual approval of (1) Defense Supplies Corporation and the Contracting Officer, Army Air Forces, Materiel Center, Wright Field, Dayton, Ohio,

in the case of the War Department; or (2) Defense Supplies Corporation and the Paymaster General, in the case of the Navy Department. Upon expiration of termination of this agreement, the unliquidated balance of advance payments shall be deducted from any payments otherwise due the Corporation hereunder, and the remaining balance, if any, shall be repaid to the War Department and/or Navy Department, as the case may be.

2. The War Department and Navy Department will purchase and take delivery of gasoline from Defense Supplies Corporation at such refineries and in such proportions as shall be determined by the Aviation Petroleum Products Allocations Committee. Said [118] Committee (herein referred to as "Allocation Committee") is an existing committee comprising representatives of the War Department, Navy Department, Petroleum Administration for War and the British Government. The War Department and Navy Department reserve the right to purchase gasoline from Defense Supplies Corporation for delivery to purchasers or consumers other than such Departments.

3. The War Department and Navy Department as agents for Defense Supplies Corporation will accept deliveries of all gasoline for the account of Defense Supplies Corporation from the various refiners at their respective refineries, and any officer or employee of the War Department or Navy Department who is properly authorized to accept deliveries of gasoline for his department is authorized

to receipt on behalf of Defense Supplies Corporation for deliveries of gasoline from refiners to Defense Supplies Corporation. Immediately thereafter the War Department and Navy Department will accept for their own accounts deliveries of gasoline from Defense Supplies Corporation. Likewise refiners will accept gasoline for their accounts immediately after delivery is accepted for Defense Supplies Corporation by its agents. In accepting deliveries from refiners receipts will be issued to the refiners on behalf of Defense Supplies Corporation and simultaneously to Defense Supplies Corporation on behalf of the War Department, Navy Department or refiner as the case may be. The receipt will be substantially in the form attached as Exhibit A.

4. Delivery of gasoline and passage of title from Defense Supplies Corporation to the War Department or Navy Department, as the case may be, will be considered as having been made at the refinery when gasoline passes through the intake pipe of a vessel, a loaded tank car is turned over to the railroad company or when loading of a truck is completed, as the case may be. Title to gasoline being resold to the refiners will not pass to the War Department or Navy Department.

5. In addition to the amount of gasoline which Defense Supplies Corporation is or will be obligated to purchase from the various refiners under its contracts, it has or will have the option to cause certain additional gasoline to be manufactured and sold to it. The quantity of this additional gasoline, spe-

cifications, and conditions under which it may be purchased are not uniform in all contracts. Defense Supplies Corporation will not exercise its option to purchase additional gasoline under any contracts until or unless requested to do so by the Allocations Committee.

6. The War Department and Navy Department assume responsibility for scheduling deliveries of all gasoline under contract by Defense Supplies Corporation from each refinery except that quantity repurchased by the refiners. All arrangements for transportation and for the furnishing of transportation facilities will be made by the War Department, Navy Department or the refiners for the gasoline allotted to each by the Allocations Committee. The War Department and Navy Department are hereby authorized by Defense Supplies Corporation to take advantage of provisions of contracts between Defense Supplies Corporation and refiners for utilization of refiners' [119] delivery facilities and services. Defense Supplies Corporation will not be liable for the payment of any transportation charges for moving gasoline. Such charges will be borne by the War Department or Navy Department or by customers purchasing gasoline from those Departments or from the refiners since all deliveries by Defense Supplies Corporation will be made at the refineries as provided in paragraph 4 hereof.

7. The War Department or Navy Department, as the case may be, will give all notices of deliveries required by the various contracts after proper allocation of gasoline by the Allocations Committee.

8. Defense Supplies Corporation, War Department and Navy Department agree that the Certificates of Inspection of quantity and quality of each shipment to the War Department and Navy Department, issued by a licensed inspector satisfactory to Defense Supplies Corporation, shall be acceptable for invoicing and payment. The Certificate of Inspection and the Receipt (Exhibit A) will be prepared in five counterparts and distributed as follows:

On set will accompany the shipment.

One set will be forwarded to Defense Supplies Corporation.

One set will accompany a monthly statement mailed to Defense Supplies Corporation showing all gasoline delivered during the preceding month.

One set will be delivered to the Seller.

One set will be delivered to the Air Service Command, Attention Fuels and Lubricants Branch, Patterson Field, Fairfield, Ohio, or to the Navy Department, as the case may be.

Defense Supplies Corporation will waive the requirement that a licensed inspector inspect the gasoline and issue a Certificate of Inspection provided that an authorized inspector or other authorized employee of the War Department or Navy Department accepts delivery and provided further that upon acceptance of the gasoline under these circumstances the authorized inspector or authorized employee issues a signed statement to Defense Supplies Corporation with respect to each shipment so accepted

indicating that the requirement for the inspection and Certificate of Inspection by a licensed inspector has been waived by him. The receipt attached as Exhibit A will be acceptable for this purpose.

9. (a) The price which Defense Supplies Corporation shall charge the War Department, the Navy Department and refiners for gasoline will be the average price per gallon for all gasoline purchased by Defense Supplies Corporation during the month, including all out-of-pocket expenses attributable to the gasoline program such as cost of inspection, maintenance of field auditors, etc., which Defense Supplies Corporation has incurred during the preceding month, as well as extraordinary expenses as set forth in paragraph 10, plus an additional $1/200$ of one cent per gallon to cover costs to Defense Supplies Corporation [120] in administering the gasoline program. Defense Supplies Corporation invoices will contain or be accompanied by a statement showing the computation by which the price per gallon was determined and by a signed counterpart of the Receipt and Certificate of Inspection, if any.

(b) Each month Defense Supplies Corporation will bill War Department, Navy Department and the refiners, respectively, for all the gasoline purchased by them during the preceding month at a price estimated by Petroleum Administration for War to cover the elements set forth in Paragraph 9 (a) hereof. The War Department and Navy Department will pay to Defense Supplies Corporation

the amounts so billed to them. In the event such estimated price is later determined to be less than or in excess of the actual price determined as provided for in paragraph 9 (a) above, an appropriate adjustment of the excess or deficiency will be made between the purchaser and Defense Supplies Corporation. Similarly gasoline will be resold by the refiners to customers other than the War Department and Navy Department at the same price they are charged by Defense Supplies Corporation, plus fair delivery and service charges and taxes applicable to the transaction, with subsequent adjustment upon final determination of price. At the request of the War Department or Navy Department, but not more frequently than once each three months, Defense Supplies Corporation will examine the expenses it has incurred in administering the gasoline program (estimating overhead and other indeterminables) and will make such adjustment as may be necessary in its charge of $1/200$ of one cent per gallon to approximate the estimated amount of actual expenses.

10. Pending renegotiation of contracts between the refiners and Defense Supplies Corporation to provide for the delivery of gasoline of specifications other than those set forth in the said contracts, it is agreed that extraordinary expenses incurred by the refiners pursuant to authorization of Petroleum Administration will be interpreted to include additional costs incurred by refiners resulting from any change in specifications of the gasoline authorized by the Petroleum Administration for War. Defense Sup-

plies Corporation will pay refiners for all extraordinary expenses approved by the Petroleum Administration for War including those resulting from a change in specifications authorized by the Petroleum Administration for War in accordance with the "Memorandum of Understanding on Plan to Reimburse Manufacturers of 91 Octane and Higher Aviation Gasoline for Losses Incurred in Following Office of Petroleum Coordinator Recommendations" dated July 24, 1942, copy of which is attached as Exhibit B, and which shall remain in full force and effect except as modified hereby. Defense Supplies Corporation will submit reports to the War Department, Navy Department and refiners showing actual amounts of extraordinary expenses as approved by the Petroleum Administration for War and paid by Defense Supplies Corporation.

11. Payments to refiners by Defense Supplies Corporation, exclusive of reimbursement for extraordinary expenses, will be made at the time specified in and in accordance with the terms of the [121] contract between Defense Supplies Corporation and the refiners.

12. Deliveries of gasoline to all eligible commercial customers, Governmental Agencies and Lend-Lease Administration will be made only in accordance with allocations of the Allocations Committee, notice of which shall be communicated to the parties concerned by the Petroleum Administration for War. All applications received by Defense Supplies Corporation from commercial customers for gasoline

will be referred to the Petroleum Administration for War for consideration by this Committee.

13. Penalties, if any, which may be imposed upon Defense Supplies Corporation for failure to accept deliveries of gasoline under the contracts between it and the refiners will be paid by the War Department or Navy Department if the penalties are the proximate result of omission or failure of such Departments.

14. Defense Supplies Corporation may at the request of the War Department, Navy Department and Petroleum Administration for War enter into contracts for the purchase of 87 octane gasoline and 91 octane gasoline. At such time as these contracts are entered into the procedure which is hereinabove established for the receipt, allocation, distribution and financing of 100 octane aviation gasoline will apply to the receipt, allocation, distribution and financing of such 87 octane gasoline and 91 octane gasoline as may be purchased by Defense Supplies Corporation pursuant to such contracts.

15. The provisions of this memorandum become effective January 1, 1943, and shall be effective through June 30, 1943.

Executed as of December 19, 1942.

DEFENSE SUPPLIES
CORPORATION,

.....

President.

PETROLEUM ADMINISTRA-
TION FOR WAR,

.....

WAR DEPARTMENT,

.....

NAVY DEPARTMENT,

..... [122]

EXHIBIT R

AGREEMENT EXTENDING AND MODIFY-
ING THE AVIATION GASOLINE REIM-
BURSEMENT PLAN AND THE FOUR
PARTY PURCHASE AGREEMENT

July 1, 1944

On July 24, 1942, the War Department, Navy Department, (hereinafter referred to as "Army" and "Navy", respectively), Office of the Petroleum Coordinator (now the Petroleum Administration for War and hereafter referred to as "PAW"), and Defense Supplies Corporation (hereafter referred to as "DSC") executed an agreement which was amended and supplemented on June 3, 1943 and April 23, 1944, and which, together with the extension thereof herein provided for, is collectively

known as the "Aviation Gasoline Reimbursement Plan." The same parties on December 19, 1942 executed an agreement for the purchase and sale by Defense Supplies Corporation of 100 octane aviation gasoline, effective for the period January 1, 1943 through June 30, 1943 which was revised May 20, 1943 and extended through June 30, 1944 and supplemented January 3, 1944, and which, together with the extension thereof herein provided for, is collectively known as the "Four Party Purchase Agreement."

The above parties believe it necessary to the successful prosecution of the War to continue the programs contemplated by the above agreements and to effect the certain clarifications and changes in the agreements. The parties accordingly have agreed that the following shall be effective through June 30, 1945 and shall supersede any and all agreements heretofore executed by the parties hereto. Any and all provisions are subject to modification or cancellation on 30 days notice by Government to the petroleum refining industry (without prejudice to claims based on operations conducted on or before the date of such [151] modification or cancellation).

* * * *

B. The Four Party Purchase Agreement:

1. This Section B shall cover the period from July 1, 1944 through June 30, 1945.

2. Any money balances due Army and Navy from DSC as of June 30, 1944 in accordance with paragraph 1 of the agreement of December 19,

1942 or the amendments and supplements thereto shall be retained by DSC as advances against the purchase price to Army and Navy, respectively, of gasoline commonly referred to as 100 octane aviation gasoline (hereinafter called "gasoline") to be sold and delivered to them by DSC during the period July 1, 1944 through June 30, 1945 hereunder. Adjustments in the amount of such advances may be made during the effective period of this agreement with the mutual approval of (1) DSC and the Contracting Officer, Materiel Command, Army Air Forces, Wright Field, Dayton, Ohio, in the case of Army; or (2) DSC and the Paymaster General, Navy Department, Washington, D. C., in the case of Navy. Upon expiration or termination of this agreement and unliquidated balances of such advances from Army and Navy shall be applied respectively against any payments then due DSC from Army and Navy for the sale and delivery to them by DSC of gasoline hereunder and the remaining balances, if any, shall be repaid by DSC to Army and/or Navy as the case may be, or, if necessary, applied as a part of any reimbursement required under paragraph 15 hereof.

3. DSC appoints Army and Navy, or either of them, through their proper officers, or employees, its agents to accept for its account deliveries of all gasoline, to receipt on behalf of DSC for the same, and to redeliver all or part thereof in accordance with the provisions of this agreement. As used herein, "proper officers or employees" are defined as any officer or employee of Army or Navy who is prop-

erly authorized to accept deliveries of gasoline for his Department.

4. Purchase of gasoline from DSC will be subject, as to quantity and end user, to determinations and assignments of the Aviation Petroleum Products Allocations Committee (hereinafter called APPAC) and, as to refinery source, to release by PAW. Army and Navy may purchase and accept delivery of gasoline from DSC at such refineries in quantities no greater than those assigned by APPAC. Army and Navy reserve the right to purchase gasoline from DSC for delivery to purchasers or consumers other than Army and Navy.

5. When, from time to time, Army or Navy wishes to provide for delivery of all or part of the gasoline assigned to it, at points other than the refinery of manufacture, such gasoline shall be resold by DSC to any refiner or distributor designated by Army or Navy for the purpose of effecting ultimate sale and delivery of such gasoline at the required destination. Sales by DSC to such refiners or distributors shall be made at the prices established in accordance with paragraph 12 of this agreement, and, except for refiners having contracts with DSC for the purchase and sale of gasoline manufactured by them, shall be for cash at the option of DSC.

6. Where gasoline has been assigned by APPAC for delivery to consumers other than those named in this agreement, any refiner having a contract with DSC for the purchase and sale of gasoline may purchase from DSC, at the prices established

in accordance with paragraph 12 of this agreement, the [153] gasoline so assigned, for delivery to such other consumers or to their designated suppliers.

7. Deliveries to Army, Navy, refiners or distributors made in accordance with paragraphs 4, 5 and 6 above shall take effect immediately after acceptance of delivery for the account of DSC in accordance with paragraph 3 above. Receipts shall be issued and distributed in the form and manner to be prescribed by DSC indicating delivery to and redelivery from DSC.

8. Delivery of gasoline and passage of title from DSC to Army or Navy at the refinery will be considered as having been made when gasoline passes through the intake pipe of a vessel, when a loaded tank car is turned over to a railroad company, or when loading of a truck is completed, as the case may be. Title to gasoline being resold to refiners or distributors in accordance with paragraphs 5 and 6 above will pass to them on the issuance in their behalf to DSC of the receipts provided for in paragraph 7 above.

9. Army and Navy assume responsibility for scheduling deliveries of all gasoline purchased by them from DSC. All arrangements for transportation and for the furnishing of transportation facilities will be made by Army, Navy, refiners or distributors for the gasoline redelivered to each in accordance with paragraphs 4, 5 and 6 above. DSC will not be liable for the payment of any transportation charges for moving gasoline. Such charges will

be borne by Army and Navy or by customers purchasing gasoline from them or from refiners or distributors since all deliveries to and by DSC will be made at the refineries as provided in paragraph 8 hereof. Army and Navy are hereby authorized by DSC to take advantage of provisions of contracts between DSC and refiners for utilization of refiners' delivery facilities and services. [154]

10. For all gasoline purchased by them from DSC, Army and Navy, as the case may be, will give all notices of delivery required of DSC by its various contracts.

11. DSC, Army and Navy agree that the Certificates of Inspection of quantity and quality of each shipment to Army and Navy issued by a licensed inspector satisfactory to DSC shall be acceptable for invoicing and payment. Such certificates shall be distributed in the manner to be prescribed by DSC after consultation with Army and Navy.

DSC will waive the requirement that a licensed inspector inspect the gasoline and issue a certificate of Inspection provided that an authorized inspector or other authorized employee of Army or Navy accepts delivery and provided further that, upon acceptance of the gasoline under these circumstances, the authorized inspector or authorized employee issues a signed statement to DSC with respect to each shipment so accepted indicating that the requirement for the inspection and Certificate of Inspection by a licensed inspector has been waived by him.

The receipt, provided for in paragraph 7 hereof, will be acceptable for this purpose.

12. The prices per gallon to be charged by DSC for gasoline sold by it (whether to Army or to Navy, or to others) shall be determined as follows:

(a) For purposes of price determination under this agreement and renewals thereof the year shall be divided into quarters commencing the first day of January, April, July and October.

(b) Prices for gasoline of the several grades sold shall be established by PAW not less than thirty days before the beginning of the quarter, based upon estimates sufficient [155] to reimburse DSC for the cost of the gasoline, applicable taxes, out-of-pocket expenses of DSC attributable to the gasoline program (including, without limitation, cost of inspection and audits, bonus and overtime payments, maintenance of field representatives and engineers, etc.), disbursements under the Aviation Gasoline Reimbursement Plan, and other expenses related or incidental to the 100 Octane Aviation Gasoline Program, incurred by DSC upon recommendation of PAW, and overhead costs of DSC in administering the gasoline program in the amount of 1/200 of one cent per gallon, except as provided for in sub-paragraph (d) of this paragraph 12.

(c) In establishing quarterly prices pursuant to subparagraph (b) of this paragraph 12, adjustments shall be made to compensate for differences, if any, found to exist between the actual costs for

any preceding quarter, computed pursuant to subparagraph (b), and the estimates for that quarter. The prices so established shall be final, and not subject to further adjustment, and shall apply to all gasoline sold by DSC during such quarter.

(d) At the request of Army or Navy, or on its own motion, but not more frequently than once during each quarter, DSC shall examine the expenses it has incurred in administering the gasoline program (estimating overhead and other indeterminables) and shall make such adjustment in its charge of $1/200$ of one cent per gallon as will approximate actual expenses and as may be agreed upon between the parties hereto.

13. Gasoline sold by DSC to refiners or distributors for delivery to Army, Navy and other customers in accordance with paragraphs 5 and 6 hereof shall be resold by the refiners or [156] distributors at a price not to exceed the price paid by them to DSC, plus such delivery and service charges and applicable taxes as are agreed upon by the refiners or distributors and Army, Navy or such other customers.

14. Deliveries of all gasoline hereunder shall be made only in accordance with assignments of AP-PAC, notice of which shall be communicated to the parties concerned by PAW.

15. Army and Navy shall, proportionately to their respective aggregate purchases of gasoline from January 1, 1943 to June 30, 1945, both dates

inclusive, reimburse DSC for all disbursements made by it in the public interest as a result of any breach, termination or cancellation of its contracts and/or sub-contracts for the production of gasoline and components, or of any other arrangements made under the Four Party Purchase Agreement or Aviation Gasoline Reimbursement Plan.

WAR DEPARTMENT

/s/ ROBERT P. PATTERSON

Under Secretary of War

DEFENSE SUPPLIES CORPORATION

/s/ GEORGE H. HILL, JR.

Executive Vice President

NAVY DEPARTMENT

/s/ JAMES FORRESTAL

Secretary of the Navy

PETROLEUM ADMINISTRATION FOR WAR

/s/ RALPH K. DAVIES

Deputy Petroleum Administrator

[Endorsed]: Filed July 2, 1945. [157]

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF PARTY
DEFENDANT AND NOTICE OF MOTION

Plaintiff, Southern Pacific Company, represents to the court as follows:

1. This action was brought by plaintiff to recover the sum of \$23,049.51, being unpaid balances of the transportation charges of shipments of benzol made during 1942 and 1943 from Seattle, Washington, to Los Angeles, California, for Defense Supplies Corporation, which amount Defense Supplies Corporation failed and refused to pay. The benzol was admittedly owned by and was the property of Defense Supplies Corporation at the time of transportation.

2. Defense Supplies Corporation claimed in this action that it was entitled to make land-grant deductions in the aggregate sum of \$23,049.51 from the tariff [158] charges for the transportation services performed on the ground that the benzol, admittedly owned by it at the time of transportation was, at the time of transportation, military and naval property of the United States moving for military and naval and not for civil use within the meaning of Section 321 of Title III, Part II, of the Transportation Act of 1940, which reserves to the United States land-grant deductions from the tariff charges for the transportation of military or naval property of the United States moving for military or naval and not for civil use.

3. Reconstruction Finance Corporation is a corporation created by the Reconstruction Finance Corporation Act (47 Stat. L. 5), and all of its capital stock is owned by the United States. It does business and has an agent and representative in the City and County of San Francisco in the Northern District of California. Prior to July 1, 1945, the date of dissolution of Defense Supplies Corporation, as hereinafter set forth, Reconstruction Finance Corporation owned all of the capital stock of Defense Supplies Corporation.

4. By Senate Joint Resolution 65 (Public Law 109 - 79th Congress, c. 215, 1st Session), approved June 30, 1945, defendant Defense Supplies Corporation, was dissolved as of July 1, 1945, and said resolution provides that all functions, powers, duties and authority of said Corporation, together with all its documents, books of account, records, assets and liabilities of every kind and nature, are thereby transferred to Reconstruction Finance Corporation and "shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation." Said resolution further provides that Reconstruction Finance Corporation shall assume and be subject to all liabilities whether arising out of contract or otherwise of said Defense Supplies Corporation, and that no suit, action or other proceeding [159] lawfully commenced by or against such corporation shall abate by reason of the enactment of the joint resolution, but that "the court, on motion or supplemental peti-

tion filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action or proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.”

5. Plaintiff, pursuant to said Joint Resolution 65, desires to have this action continued and maintained against said Reconstruction Finance Corporation.

6. There is a necessity for the survival of said action to obtain a determination of the questions involved, for the following reasons:

(a) Reconstruction Finance Corporation, successor in interest of Defense Supplies Corporation, takes the same position as Defense Supplies Corporation took in this action, namely, that the benzol shipped, admittedly owned by Defense Supplies Corporation at the time of shipment, was, at the time of transportation, military and naval property of the United States moving for military and naval and not for civil use within the meaning of Section 321 of Title III, Part II, of the Transportation Act of 1940, which reserves to the United States land-grant deductions from the tariff charges for the transportation of military or naval property of the United States moving for military or naval and not for civil use, and that therefore Defense Supplies Corporation was entitled to land-grant deductions from the tariff charges.

(b) The dissolution of the Defense Supplies

Corporation has in no way caused the questions involved in this action to become moot, and has not dispensed with the necessity of maintaining this action to determine the questions involved.

Wherefore plaintiff moves this court for an order substituting Reconstruction Finance Corporation in the place and stead of Defense Supplies Corporation as party defendant in this action and continuing and maintaining said action against said Reconstruction Finance Corporation without prejudice to any proceedings already had in this action. This motion is based on the pleadings and other papers on file in this action, draft of proposed order, affidavit of Charles W. Burkett, Jr., and memorandum of points and authorities in support of motion for substitution of party defendant, said draft of proposed order, affidavit, and memorandum being attached to and served and filed with this motion.

Dated this 26th day of October, 1945.

/s/ C. O. AMONETTE,

/s/ CHARLES W. BURKETT, JR.,
Attorneys for Plaintiff

NOTICE OF MOTION

To defendant Defense Supplies Corporation and Theodore R. Meyer, Esq., R. L. Miller, Esq., Joseph F. Hogan, Esq., and Messrs. Brobeck, Phleger & Harrison, its attorneys:

Please Take Notice that the undersigned will bring the above motion on for hearing before this

court at Room 258, United States Courts and Post Office Building, 7th and Mission Streets, City and County of San Francisco, State of California, on Monday, the 5th day of November, 1945, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ C. O. AMONETTE,
/s/ CHARLES W. BURKETT, JR.,
Attorneys for Plaintiff [161]

Reconstruction Finance Corporation consents to the foregoing motion and notice of motion and to the entry of an order, in the form attached, granting said motion.

Dated: October 26, 1945.

RECONSTRUCTION FINANCE CORPORATION

/s/ THEODORE R. MEYER,
/s/ R. L. MILLER,
/s/ JOSEPH F. HOGAN,
/s/ BROBECK, PHLEGER & HARRISON,
Its Attorneys

Receipt of a copy of the foregoing motion and notice and papers attached is hereby acknowledged this 26th day of October, 1945.

/s/ THEODORE R. MEYER,
/s/ R. L. MILLER,
/s/ JOSEPH F. HOGAN,
/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Defendant

[Endorsed]: Filed Dec. 28, 1945. [162]

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES W. BURKETT, JR.,
IN SUPPORT OF MOTION FOR SUBSTITUTION OF PARTY DEFENDANT

State of California,

City and County of San Francisco—ss.

Charles W. Burkett, Jr., being first duly sworn,
says:

1. He is one of the attorneys for plaintiff, Southern Pacific Company, in the above entitled action.

2. This action was brought by plaintiff to recover the sum of \$23,049.51, being unpaid balances of the transportation charges on shipments of benzol made during 1942 and 1943 from Seattle, Washington, to Los Angeles, California, for Defense Supplies Corporation, which amount Defense Supplies Corporation failed and refused to pay. The benzol was admittedly owned by and [163] was the property of Defense Supplies Corporation at the time of transportation.

3. Defense Supplies Corporation claimed in this action that it was entitled to make land-grant deductions in the aggregate sum of \$23,049.51 from the tariff charges for the transportation services performed on the ground that the benzol, admittedly owned by it at the time of transportation, was, at the time of transportation, military and naval property of the United States moving for military and naval and not for civil use within the meaning of Section 321 of Title III, Part II, of the Transpor-

tation Act of 1940, which reserves to the United States land-grant deductions from the tariff charges for the transportation of military or naval property of the United States moving for military or naval and not for civil use.

4. Reconstruction Finance Corporation is a corporation created by the Reconstruction Finance Corporation Act (47 Stat. L. 5), and all of its capital stock is owned by the United States. It does business and has an agent and representative in the City and County of San Francisco in the Northern District of California. Prior to July 1, 1945, the date of dissolution of Defense Supplies Corporation, as hereinafter set forth, Reconstruction Finance Corporation owned all of the capital stock of Defense Supplies Corporation.

5. By Senate Joint Resolution 65 (Public Law 109 - 79th Congress, c. 215, 1st Session), approved June 30, 1945, defendant, Defense Supplies Corporation, was dissolved as of July 1, 1945, and said resolution provides that all functions, powers, duties and authority of said Corporation, together with all its documents, books of account, records, assets and liabilities of every kind and nature, are thereby transferred to Reconstruction Finance Corporation and "shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and [164] effect as if originally vested in Reconstruction Finance Corporation." Said resolution further provides that Reconstruction Finance Corporation shall assume and be sub-

ject to all liabilities whether arising out of contract or otherwise of said Defense Supplies Corporation, and that no suit, action or other proceeding lawfully commenced by or against such corporation shall abate by reason of the enactment of the joint resolution, but that "the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation."

6. There is a necessity for the survival of said action to obtain a determination of the questions involved, for the following reasons:

(a) Reconstruction Finance Corporation, successor in interest of Defense Supplies Corporation, takes the same position as Defense Supplies Corporation took in this action, namely, that the benzol shipped, admittedly owned by Defense Supplies Corporation at the time of shipment, was, at the time of transportation, military and naval property of the United States moving for military and naval and not for civil use within the meaning of Section 321 of Title III, Part II, of the Transportation Act of 1940, which reserves to the United States land-grant deductions from the tariff charges for the transportation of military or naval property of the United States moving for military or naval and not for civil use, and that therefore Defense Sup-

plies Corporation was entitled to land-grant deductions from the tariff charges.

(b) The dissolution of Defense Supplies Corporation has in no way caused the questions involved in this action to become moot, and has not dispensed with the necessity of maintaining [165] this action to determine the questions involved.

/s/ CHARLES W. BURKETT, JR.

Subscribed and sworn to before me this 26th day of October, 1945.

[Seal] /s/ A. L. WHITTLE,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires September 18, 1946.

[Endorsed]: Filed Oct. 26, 1945. [166]

[Title of District Court and Cause.]

ORDER FOR SUBSTITUTION OF
PARTY DEFENDANT

This cause came on for hearing on plaintiff's motion for substitution of Reconstruction Finance Corporation as a party defendant to this action in the place and stead of Defense Supplies Corporation and for continuing and maintaining this action against Reconstruction Finance Corporation, without prejudice to any proceedings already had, and it appearing to the Court that there is a necessity for the survival of this action to obtain a determination of the questions involved;

It Is Ordered, that Reconstruction Finance Corporation be and it is hereby substituted as party defendant in the place and stead of Defense Supplies Corporation; that the title of the [167] action be amended accordingly; and the action be continued and maintained against said Reconstruction Finance Corporation without prejudice to any proceedings already had in this action.

Dated this 5th day of November, 1945.

LOUIS E. GOODMAN

Judge of said United States District Court.

[Endorsed]: Filed Nov. 5, 1945. [168]

[Title of District Court and Cause.]

Appearances: C. W. Durbrow, Charles W. Burckett, Jr., C. O. Amonette, 65 Market Street, San Francisco 5, California. Attorneys for Plaintiff. Theodore R. Meyer, R. L. Miller, Joseph F. Hogan, Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, California. Attorneys for Defendant.

OPINION

Goodman, District Judge.

During the years 1942 and 1943, defendant Defense Supplies Corporation shipped to itself from Seattle, Washington [169] to Los Angeles, California, via the railroads of plaintiff and other participating carriers and upon government bills-of-

lading, certain tank cars of motor benzol. Defendant refused to pay plaintiff, as the delivering carrier, for such transportation at the commercial rates established under tariffs filed with the Interstate Commerce Commission. Instead it paid a lower rate, arrived at by deducting from the tariff rate certain so-called land grant allowances reserved to the United States under the Transportation Act of 1940 where "military or naval property of the United States" is transported for "military or naval and not for civil use," over the lines of those railroad companies that had received land grants from the United States. Transportation Act of 1940 c. 722, sec. 321, 54 Stat. 954; 49 USCA S 65.

Prior to September 18, 1940, the United States was the beneficiary of freight rate deductions upon the transportation of any kind of government property that moved over railroads which had received land grants from the United States and over other railroads signing so-called "equalization agreements" in order to meet the land-grant railroad rates. (*Lake Superior & M.R. Co. v. U. S.* 93 U.S. 442, 23 L. ed. 965; *Atchison T & S.F.R.R. Co. v. U. S.* 15 Ct. Cl. 126; Act of June 7, 1924, c. 291, 10 USCA 1375; *Powell v. U. S.* 60 Fed. Supp. 433, 435, 436.)

However by the Act of 1940, as to those carriers who theretofore released and quitclaimed to the United States, the lands previously granted to them by the government, (Sec. 321b) the land-grant deductions allowed the United States apply only to

military or naval property of the United States moving for military or naval use. [170]

All of the carriers participating in the transportation of the benzol, including plaintiff, were either land-grant aided roads or had entered into equalization agreements, and all of such land-grant aided carriers had filed the releases required by the Act.

This action seeks the recovery of the sum of \$23,-049.51 being the amount of the deducted land-grant allowances.

If the benzol was, at the time of its transportation, military or naval property of the United States being moved for military or naval and not for civil use, plaintiff cannot recover. On the other hand, if the benzol was not military or naval property of the United States nor if it was not transported for military or naval use, plaintiff should recover.

The cause was submitted upon briefs after the filing of a written stipulation of facts.

Plaintiff's first contention is that the motor benzol was not property of the United States because it was owned at the time by defendant Defense Supplies Corporation* which plaintiff claims to be an entity separate and distinct from the United States.

However, in none of the cases cited by plaintiff was it squarely adjudicated that property of which the United States was sole beneficiary, was not its

* Created under the authority of Sec. 5d(3) of the Reconstruction Finance Corp. Act, 15 USCA §606(b)(3). 1944 Cumulative Annual Pocket Part.

property because the naked title was held by a corporate instrumentality. On the other hand, in the following cases where property was carried in the names of corporate instrumentalities, such property was held to be government owned: *Clallams* [171] County, Wash., v. U. S. 263 U. S. 341 (*Spruce Production Corporation*); *King County, Wash., v. U. S. Shipping Board Emergency Fleet Corporation*, (9 Cir.) 282 Fed. 950; *U. S. Shipping Board Emergency Fleet Corp. v. Delaware Co., Pa.* (3 Cir.) 17 Fed. (2d) 40; *U. S. v. Skinner & Eddy Corp.* 28 Fed. (2d) 373; *Chevy Cotton Mills Inc. v. U. S.* 59 Fed. Supp. 122 (*Reconstruction Finance Corp.*); *Inland Waterways Corp. v. Young*, 309 U. S. 517. Directly in point as to *Defense Supplies Corporation* is the case of *Defense Supplies Corp. v. U. S. Lines Co.* 57 Fed. 291. (decision of Judge Knox.)

It is urged by plaintiff that Congress did not intend that the words "property of the United States" as used in the *Transportation Act of 1940* should embrace property held in the name of corporate instrumentalities, because while in other regulatory statutes specific mention is made of "government owned or controlled corporations," such mention is not made in the *Transportation Act of 1940*. This argument, however, fails for the reasons given in *Keifer & Keifer v. Reconstruction Finance Corp.* 306 U. S. 381, and also because a true appraisal of the purpose and background setting of the *Transportation Act of 1940* negates any imputation that Congress intended such an irrational or capricious objective as to deprive the United States

of the rights and benefits attaching to ownership of its property held in the name of this particular instrumentality of government. Other arguments urged by plaintiff in this connection are not of sufficient substance to warrant further comment.

Plaintiff's second contention is that the benzol transported was not military or naval property. Here is presented a question of first impression. Its resolution requires appraisal of the purpose and nature of defendant's [172] powers and activities. During the period preceding the attack on Pearl Harbor and also subsequent thereto, various agencies of the government, corporate and otherwise, were established to acquire, produce and distribute material and commodities for use in the national defense and to further the successful prosecution of the war. Defendant was such an agency. (Sec. 5(d)(3) Reconstruction Finance Corp. Act. 15 USCA 606(b)(3).

After Pearl Harbor, the government decided to and did acquire through defendant agency large quantities of benzol for use principally* in the manufacture of aviation gasoline and synthetic rubber tires for the armed forces. It is urged on behalf of plaintiff that in order to be classified as naval or military property, the benzol had to be acquired by the War or Navy Departments in the manner and

* Approximately 87% of the total benzol shipped was used in the making of aviation gasoline and synthetic rubber tires for the armed forces. About 13% found its way incidentally and eventually into non-military channels.

by officers or agencies specially authorized by the Congress to act for such Departments and with monies appropriated by Congress for that purpose. Viewed in the context and against the background of the Transportation Act of 1940, this is too narrow and illiberal an interpretation of the language of the Act.

It is true, as stated by plaintiff, that pursuant to its constitutional powers to raise and equip armies and navies, Congress has from time to time appropriated monies to acquire properties for the armed forces and has designated the officers authorized to so act, in the case of the Army, by 10 USCA 1191, and in the case of the Navy, by 34 USCA 560. It is also true that defendant corporation has no Congressional authority to make purchases for the Army or Navy Departments. [173]

But it does not follow at all that, within the purview of the Transportation Act of 1940, property purchased and transported by the Defense Supplies Corporation may not be "military or naval property" of the United States. The words "military" and "naval" as used in the Act are descriptive adjectives. In context they may refer to property of the War or Navy Departments but they also properly and logically are descriptive, irrespective of ownership, of the nature of the property itself, with respect not merely to its tangible form and characteristics but as well, as is the case here, to the nature of its contemplated use. Having in mind the history of the "land grant allowance" legislation,

it is clear to me that Congress did not intend to retain for the benefit of the United States reduced rates for the transportation only of properly assigned to the War or Navy Departments and fit for immediate use and not for its property undeniably dedicated to military use but not yet assigned to the War Department because not at the moment in the ultimate form usable in actual conflict.

The powers granted by Congress to defendant (Charter clause 5 to acquire, produce and deal in materials and implements of war on a vast scale, plainly indicate Congressional awareness of the advantageous facilities afforded by defendant agency in the handling of material necessitated by modern methods of warfare requiring total mobilization of resources. Moreover, the stipulation of facts recognizes that defendant, in acquiring and transporting the benzol, was functioning in cooperation with the naval and military establishments of the United States.

If the Army or Navy were, at the time in question [174] moving the benzol via plaintiff's railroad to the same refineries for the same purpose, plaintiff would not object to the claimed land grant allowance. This is so by the force of the very argument made that the statutory language limits the statutory benefit to military property of the War or Navy Departments. By this token, the benzol is none the less military property moving for military use, because of its control at the time by another lawful agency of the United States.

I conclude that the benzol was in fact military or naval property of the United States.

We now reach the final question raised, viz: Was the benzol "moving for military or naval and not civil use?"

Concededly, the United States would not be entitled to the reduced rate allowed by the statute even if the benzol were military or naval property, unless it also appeared that it was being transported for military and not civil use. This is so because the United States might very conceivably move military or naval property for purely civilian and non-military use.

The term "military" is defined in Funk & Wagnall's New Standard Dictionary, in part, as "of or pertaining to soldiers, arms, or warfare . . . warlike . . . martial." Bouvier speaks of it as "anything pertaining to war or to the Army." Third Revision Vol. 2, p. 2209.

On the other hand "civil" is defined as "pertaining to a citizen in regard to ordinary affairs; opposed to ecclesiastical or military." (Funk & Wagnall.)

Thus the terms "military" and "civil" are mutually exclusive. The benzol here was to be manufactured into aviation gasoline and tires for the armed forces. It [175] certainly did not pertain "to a citizen in regard to ordinary affairs." Its transportation was to place where it was to be used in greatest part "pertaining to soldiers, arms or

warfare." Its relationship to the physical force of conflict and combat was actual and proximate.

That the benzol had to be processed and other component material added, does not, as contended, detract from its status as military property at the time of transportation. To fix its status according to the standards proposed by plaintiff would involve refinements of evaluation too speculative and too far removed from realities. At what point would its "military use" become an actuality? When the first drop was mixed with added material? When the manufacturing process was completed? When the first drum of gasoline or first tire started on their way? When the gasoline was syphoned into an airplane tank? Or perhaps not until the airplane had entered upon the performance of its mission?

The contention that the property was not moving for "use" but for sale to the processing oil refineries lacks merit, for the so-called "sale" to the refineries was but an intermediate step in the use.

There is, in my opinion, a final and persuasive basis for the court's interpretation of the terms "military property" and "military use" as expressed in the Act. Prior to the outbreak of World War II, a narrower and stricter meaning might well be attached to these phrases, because up to that time through the course of history, military and naval operations had restricted themselves to specific areas and theatres. Human ingenuity in waging war had been limited by space and distance. But

after 1939, the [176] horrors of unlimited total war became a certainty. At or about the time of the passage of the Transportation Act of 1940, many other statutes were enacted by Congress in the endeavor to prepare for our anticipated participation in the struggle.* Total mobilization required the creation of agencies to produce and gather the resources of war. Thus much material which in older days might have lacked the classical military habilitments, became of vital military importance. Hence it is that a just and fair adjudication of the meaning of the statute's language cannot be made without considering the over-all effect of the concept of total global warfare.

Judgment will go for defendant. Findings may be prepared and presented in accordance with the Rules.

Dated: January 21st, 1946.

[Endorsed]: Filed Jan. 21, 1946. [177]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff filed its complaint herein on July 12, 1944, and on January 10, 1945, the defendant therein named, Defense Supplies Corporation, a corpora-

* See notes to the opinion of Judge Hutcheson in *Powell v. United States*, 60 Fed. Supp. 433 as to the related legislation.

tion, filed its answer thereto. The parties thereafter entered into and lodged with the court a stipulation embodying all of the evidentiary facts pertinent to the issues raised by said complaint and answer. On November 5, 1945, upon motion of the plaintiff the above-entitled court entered its order substituting Reconstruction Finance Corporation, a corporation, as party defendant to this action, in the place and stead of said Defense Supplies Corporation. Briefs were thereupon submitted to the court and on November 19, 1945, the cause was submitted.

The court having fully considered the facts and the law in this matter, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

I.

Plaintiff is now, and was during all of the times hereinafter mentioned, a corporation duly created, organized and existing under the laws of the State of Kentucky, authorized to do and doing business in the State of California and in other states, and, as such corporation, was during all of said times engaged as a common carrier by railroad in the transportation of persons and property for hire in interstate commerce over its lines and in participation with other common carriers by railroad in and through various states of the United States.

II.

The original defendant, Defense Supplies Cor-

poration, was, during all of the times hereinafter mentioned prior to July 1, 1945, a corporate instrumentality of the United States created [179] by the United States pursuant to Section 5d(3) of the Reconstruction Finance Corporation Act (15 U.S.C.A., Sec. 606b(3)). It objects, purposes and powers are those provided for in the Act pursuant to which it was created. All of its capital stock was owned by Reconstruction Finance Corporation. Said Reconstruction Finance Corporation was at all times herein mentioned and still is a corporate instrumentality of the United States created by the United States government by the Act of Congress known as the Reconstruction Finance Corporation Act (15 U.S.C.A., sections 601 et seq.). All of the stock of said Reconstruction Finance Corporation was at all times and still is owned by the United States government. By Senate Joint Resolution 65 (Public Law 109 79th Cong., c. 215, 1st Sess.) approved June 30, 1945, Defense Supplies Corporation was dissolved as of July 1, 1945, and pursuant to said resolution all of its functions, powers, duties and authority, together with all its documents, books of account, records, assets and liabilities of every kind and nature were thereby transferred to Reconstruction Finance Corporation. Pursuant to the terms of said resolution and upon proper showing to this court and by order of this court dated November 5, 1945, said Reconstruction Finance Corporation was substituted as defendant in this action in the place and stead of said Defense Supplies Corporation, and said action was thereby

allowed to be continued and maintained against said Reconstruction Finance Corporation. The principal office of the original defendant, Defense Supplies Corporation, was located in the City of Washington, District of Columbia, but at all times herein mentioned prior to July 1, 1945, it did business in the City and County of San Francisco, in the [180] Northern District of California.

III.

During the years 1942 and 1943, commencing in the month of July, 1942, defendant shipped to itself from Seattle, Washington, to Los Angeles, California, upon government bills of lading over the lines of plaintiff and other participating carriers certain tank cars of motor benzol. Prior to, at the time of, and during said transportation, legal title to said motor benzol was vested in said Defense Supplies Corporation, a corporate instrumentality of the United States. Plaintiff was the final and delivering carrier and made delivery of said shipments in accordance with the bills of lading.

IV.

The lines of plaintiff over which said motor benzol was transported were constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest. The portions of the lines of all carriers by railroad participating with plaintiff in the transportation of said motor benzol, over which said motor benzol was transported, were

either similarly constructed with the aid of grants of land received from the United States or, with respect to such portion of the lines not so constructed by such aid, such carrier had, prior to the shipments here involved, entered into equalization agreements with the United States under the terms of which the net charges to the United States for transportation service over such lines were equalized with the transportation charges applicable to transportation over lines constructed with the aid of such grants of land. All the carriers by railroad owning and operating or operating lines of railroad so constructed with the aid of such land [181] grants and all carriers by railroad who had entered into such equalization agreements, and each of them, had prior to and at the time of the shipments of motor benzol here involved, filed with the Secretary of the Interior of the United States, in the form and manner prescribed by him, the releases specified to be filed by the provisions of paragraph (b) of Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. L. 954). Each of the releases so filed was approved by the Secretary of the Interior prior to any of the shipments in question and the performance of the transportation services involved herein.

V.

Said shipments of motor benzol so shipped upon government bills of lading were billed and forwarded with charges collect and plaintiff, being the delivering carrier charged with the duty of

collecting the entire freight charges on said shipments, presented to defendant its respective bills therefor aggregating the sum of \$56,736.14 for such transportation services. Defendant, claiming the right to make land-grant deductions in amounts aggregating the sum of \$23,049.51, refused to make the payments demanded but instead paid to plaintiff amounts aggregating the sum of \$33,686.63. The amount admittedly payable by defendant to plaintiff for the transportation services involved herein, if defendant is entitled to land-grant deductions under the provisions of Section 321(a) of the Transportation Act of 1940, on the entire quantity of motor benzol transported over the lines of the plaintiff and the participating carriers, is the said sum of \$33,686.63. The said amounts so paid were accepted by plaintiff under protest as part payment [182] only and plaintiff subsequently and prior to the bringing of this action, rendered its bills to defendant for the difference between the amounts so paid and certain amounts claimed by it to be due upon the basis of the application of the full commercial rates specified in tariffs duly published and filed with the Interstate Commerce Commission in effect at the time the shipments were made. It is admitted by the parties that if defendant is entitled to land-grant deductions with respect to none of the shipments of motor benzol involved in this case, that the difference between such full published tariff rates and the amounts paid by defendant, which difference plaintiff would in such event be entitled to recover, is \$23,049.51.

VI.

The entire quantity of motor benzol involved in this case was at the time of its transportation owned by Defense Supplies Corporation.

The entire quantity of ^{VII}motor benzol involved in this case was at the time of its transportation military or naval property of the United States.

VIII.

All of said motor benzol was at the time of its said transportation, moving for use in the production of aviation gasoline and synthetic rubber for use in the direct prosecution of war. The entire quantity of motor benzol involved in this case was at the time of its transportation moving for military or naval and not for civil use. [183]

CONCLUSIONS OF LAW

I.

The motor benzol involved in this case, naked legal title to which at the time of its transportation stood in the name of the Defense Supplies Corporation, a corporate instrumentality of the United States, was at the time of its said transportation "property of the United States" within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940.

II.

The motor benzol involved in this case was, at the time of its transportation, "military or naval" property of the United States and was "moving for

military or naval and not for civil use'' within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940.

II.

Defense Supplies Corporation was entitled to make land-grant deductions from the applicable published tariff rates under the provisions of Section 321(a) of the Transportation Act of 1940, with respect to all of the transportation services provided by plaintiff and other participating carriers in the transportation of the motor benzol involved in this case.

IV.

Plaintiff is entitled to recover nothing from defendant, and defendant is entitled to its costs of suit herein incurred.

It Is So Ordered and the Clerk shall enter judgment forthwith.

Dated this 18th day of February, 1946.

LOUIS E. GOODMAN,

Judge of the United States
District Court.

[Endorsed]: Filed Feb. 18, 1946. [184]

In the United States District Court for the
Northern District of California, Southern Division

No. 23495-G

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a Corporation,

Defendant.

JUDGMENT

The above entitled action was submitted to the court for decision upon the basis of the pleadings on file, a stipulation of facts, and briefs of the parties to the action. Messrs. C. O. Amonette and Charles W. Burkett, Jr., appeared as attorneys for the plaintiff, Southern Pacific Company, a corporation, and Theodore R. Meyer, R. L. Miller, Joseph F. Hogan and Brobeck, Phleger & Harrison appeared as attorneys for Defense Supplies Corporation, a corporation, the original defendant, and for Reconstruction Finance Corporation, a corporation, the substituted defendant.

The cause having been submitted to the court for consideration and decision, and the court having delivered and filed its findings of fact and conclusions of law;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that Southern Pacific Company, a cor-

poration, the plaintiff herein, take nothing from the defendant.

Dated: February 28, 1946. [185]

LOUIS E. GOODMAN,
Judge.

Approved as to form, as provided in Rule 5(d):

/s/ C. O. AMONETTE,

/s/ CHARLES W. BURKETT, JR.,

Attorneys for Plaintiff.

Due service and receipt of a copy of the within is hereby admitted this 28th day of February, 1946.

C. O. AMONETTE,

CHARLES W. BURKETT, JR.,

Attorneys for Plaintiff,

Southern Pacific Company.

[Endorsed]: Filed Feb. 28, 1946. [186]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Southern Pacific Company, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 28th day of February, 1946.

Dated this 9th day of May, 1946.

/s/ C. O. AMONETTE,

/s/ CHARLES W. BURKETT, JR.,

Attorneys for Plaintiff.

[Endorsed]: Filed May 9, 1946. [187]

[Title of District Court and Cause.]

BOND COSTS ON APPEAL

Know All Men By These Presents, that we, Southern Pacific Company, a corporation, as principal, and Saint Paul-Mercury Indemnity Company, a corporation, as surety, are held and firmly bound unto Reconstruction Finance Corporation, a corporation, in the full and just sum of Two Hundred Fifty Dollars (\$250.00), to be paid to said Reconstruction Finance Corporation, its successors or assigns, to which payment, well and truly to be made, we bind ourselves jointly and severally by these presents.

In Witness whereof, said Southern Pacific Company, a corporation, has caused this obligation to be signed by its duly authorized Vice President, and its corporate seal to be thereunto affixed at San Francisco, California, this 8th day of May, 1946, and said Saint Paul-Mercury Indemnity Company, a corporation, has [188] caused this obligation to be signed by its duly authorized attorney-in-fact and its corporate seal to be thereunto affixed at San Francisco, California, this 8th day of May, 1946.

Whereas, on the 28th day of February, 1946, in an action depending in the United States District Court for the Northern District of California, Southern Division, between Southern Pacific Company, a corporation, plaintiff, and Reconstruction Finance Corporation, a corporation, defendant, a judgment was rendered against said Southern Pacific Company and said Southern Pacific Company

intends to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment;

Now the condition of the above obligation is such, that if said Southern Pacific Company shall prosecute its appeal with effect and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment be modified, then the above obligation to be void, otherwise to remain in full force and virtue.

SOUTHERN PACIFIC COMPANY,

By D. J. RUSSELL,
Vice President.

Attest:

[Seal] ROY G. HILLEBRAND,
Assistant Secretary.

SAINT PAUL-MERCURY IN-
DEMNITY COMPANY,

[Seal] R. B. RYAN,
Its Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 8th day of May in the year One Thousand Nine Hundred and Forty-six before me, A. L. Whittle, 65 Market St., a Notary Public in and for the City and County of San Francisco, State of California, personally appeared D. J. Russell, known to me to be the Vice President of the corporation described in and that executed the within instrument, and also known to me to be the person

who executed it on behalf of the corporation therein named and he acknowledged to me that such corporation executed the same. *

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] A. L. WHITTLE,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 18, 1946.

ACKNOWLEDGMENT OF ATTORNEY- IN-FACT

State of California,
City and County of San Francisco—ss.

On this 8th day of May, 1946, before me, a Notary Public, within and for the said County and State, personally appeared R. B. Ryan, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of and for the Saint Paul-Mercury Indemnity Company, Saint Paul, Minnesota, a corporation created, organized and existing under and by virtue of the laws of the State of Delaware, and acknowledged to me that he subscribed the name of the Saint Paul-Mercury Indemnity Company thereto as Surety, and his own name as Attorney-in-Fact.

[Seal] JANE M. DOUGHERTY,

Notary Public.

My Commission expires September 24, 1949.

[Endorsed]: Filed May 9, 1946. [189]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFF INTENDS TO RELY ON AP-
PEAL

The points on which plaintiff intends to rely on appeal are as follows:

I.

The Court erred in making its Finding of Fact No. VII in that:

1. Said finding is not supported by the evidence.

2. Said finding is contrary to the evidence in that the evidence (Stipulation of Facts) shows that:

(a) The motor benzol was purchased by and was, at the time of its transportation, the property of and owned by Defense Supplies Corporation, a corporate entity separate and distinct from the United States, and was not the property of the United States. [190]

(b) The motor benzol was not, at the time of its transportation, military or naval property but only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline which, when manufactured or produced, was suitable for military or naval use and of synthetic rubber which, when manufactured or produced, was suitable for use in

the manufacture or production of rubber products suitable for military or naval use.

(c) The United States bought a portion of the rubber products and the 100 octane aviation gasoline, of which the motor benzol ultimately became a constituent part, for use by the Army and Navy.

3. Said finding was induced by an erroneous view of the law in that:

(a) Said finding is based on the view that the motor benzol which was purchased by and was, at the time of its transportation, the property of and owned by Defense Supplies Corporation, a corporate entity separate and distinct from the United States, was the property of the United States.

(b) Said finding is based on the view that the motor benzol, unsuitable at the time of its transportation for military or naval use, was, at the time of its transportation, military or naval property when materials manufactured or produced therefrom by purchasers of the motor benzol from Defense Supplies Corporation, subsequent to its transportation, were used, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, which property was acquired by the United States for military or naval use. [191]

II.

The Court erred in making its Findings of Fact No. VIII in that:

1. Said finding is not supported by the evidence.
2. Said finding is contrary to the evidence in that the evidence (Stipulation of Facts) shows that:

(a) At the time of its transportation the motor benzol was moving for storage, processing and sale and was, subsequent to its transportation, stored and processed.

(b) Subsequent to its transportation the motor benzol was sold by Defense Supplies Corporation for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline and of synthetic rubber, which was suitable for use in the manufacture or production of rubber products.

(c) Said motor benzol was used, in connection with other other materials, in the manufacture or production of materials which were suitable for use and used, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline suitable for military or naval use, and of synthetic rubber which was suitable for use and used in the manufacture or production of rubber products suitable for military or naval use.

(d) The United States bought a portion of the rubber products and the 100 octane aviation gaso-

line, of which the motor benzol ultimately became a constituent part, for use by the Army and Navy.

3. Said finding was induced by an erroneous view of the law in that said finding is based on the view that the use of the motor benzol, in connection with other materials, in the manufacture [192] or production of materials suitable for use and used, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, was a military or naval use of the motor benzol.

III.

The Court's Conclusion of Law No. I is erroneous in that it is based on the erroneous Finding of Fact No. VII, and on the erroneous assumption, which is not supported by any evidence, that Defense Supplies Corporation had, at the time of transportation, only a naked legal title to the motor benzol, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraph I.

IV.

The Court's Conclusion of Law No. II is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

V.

The Court's Conclusion of Law No. III is erroneous in that it is based on the erroneous Findings

of Fact Nos. VII and VIII, and on the erroneous Conclusions of Law Nos. I and II, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

VI.

The Court's Conclusions of Law No. IV is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and on the erroneous Conclusions of Law Nos. I, II and III, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

VII.

The Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "property of [193] the United States" within the meaning of that language as it is used in Section 321 (a) of the Transportation Act of 1940, but was the property of and owned by Defense Supplies Corporation, a corporate entity separate and distinct from the United States.

VIII.

The Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "military or naval" property of the United States within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940, but was only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the

manufacture or production of 100 octane aviation gasoline and synthetic rubber suitable for use in the manufacture or production of rubber products.

IX.

The Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "moving for military or naval and not for civil use" within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940, but was moving for storage, processing and sale, which are not military or naval uses within the meaning of the language in Section 321(a).

X.

The Court erred in failing to conclude that Defense Supplies Corporation was not entitled to make land-grant deductions from the applicable published tariff rates with respect to any of the transportation services provided by plaintiff and other participating carriers in the transportation of the motor benzol involved in this case.

XI.

The Court erred in failing to conclude that plaintiff is [194] entitled to recover from defendant the sum of \$23,049.51 and its costs herein incurred.

Dated this 10th day of May, 1946.

/s/ C. O. AMONETTE,

/s/ CHARLES W. BURKETT, JR.,
Attorneys for Plaintiff.

Receipt of a copy of the within Statement of Points on Which Plaintiff Intends to Rely on Appeal is hereby acknowledged this 10th day of May, 1946.

/s/ THEODORE R. MEYER,

/s/ R. L. MILLER,

/s/ JOSEPH F. HOGAN,

/s/ BROBECK, PHLEGER &
HARRISON,

Attorneys for Defendant.

[Endorsed]: Filed May 10, 1946. [195]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Plaintiff designates the portions of the record, proceedings, and evidence to be contained in the record on appeal in this action as follows:

1. Complaint.
2. Answer.
3. Stipulation of facts.
4. Motion for substitution of party defendant and notice of motion.
5. Order for substitution of party defendant.
6. Opinion of the court.
7. Findings of fact and conclusions of law.
8. Judgment.
9. Notice of appeal. [196]
10. Bond for costs on appeal.

11. Statement of points on which appellant intends to rely on appeal.

12. This designation.

Dated this 10th day of May, 1946.

/s/ C. O. AMONETTE,

/s/ CHARLES W. BURKETT, JR.,

Attorneys for Plaintiff.

Receipt of a copy of the within Designation of Contents of Record on Appeal is hereby acknowledged this 10th day of May, 1946.

/s/ THEODORE R. MEYER,

/s/ R. L. MILLER,

/s/ JOSEPH F. HOGAN,

/s/ BROBECK, PHLEGER &

HARRISON,

Attorneys for Defendant.

[Endorsed]: Filed May 10, 1946. [197]

District Court of the United States

Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 197 pages, numbered from 1 to 197, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Southern Pacific Company, a corporation, plaintiff, vs. Reconstruc-

tion Finance Corporation, defendant, No. 23495-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$19.70 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of June, A.D. 1946.

[Seal]

C. W. CALBREATH,
Clerk.

By M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 11352. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Reconstruction Finance Corporation, substituted as party defendant in the place of Defense Supplies Corporation, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 12, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11352

SOUTHERN PACIFIC COMPANY, a corporation,
tion,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,
TION, a corporation,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF PORTIONS OF RECORD

POINTS

The points on which appellant intends to rely on appeal are as follows:

I.

The Court erred in making its Finding of Fact No. VII in that:

1. Said finding is not supported by the evidence.
2. Said finding is contrary to the evidence in that the evidence (Stipulation of Facts) shows that:

(a) The motor benzol was purchased by and was, at the time of its transportation, the property

of and owned by Defense Supplies Corporation, a corporate entity separate and distinct from the United States, and was not the property of the United States.

(b) The motor benzol was not, at the time of its transportation, military or naval property but only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline which, when manufactured or produced, was suitable for military or naval use and of synthetic rubber which, when manufactured or produced, was suitable for use in the manufacture or production of rubber products suitable for military or naval use.

(c) The United States bought a portion of the rubber products and the 100 octane aviation gasoline, of which the motor benzol ultimately became a constituent part, for use by the Army and Navy.

3. Said finding was induced by an erroneous view of the law in that:

(a) Said finding is based on the view that the motor benzol which was purchased by and was, at the time of its transportation, the property of and owned by Defense Supplies Corporation, a corporate entity separate and distinct from the United States, was the property of the United States.

(b) Said finding is based on the view that the motor benzol, unsuitable at the time of its trans-

portation for military or naval use, was, at the time of its transportation, military or naval property when materials manufactured or produced therefrom by purchasers of the motor benzol from Defense Supplies Corporation, subsequent to its transportation, were used, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, which property was acquired by the United States for military or naval use.

II.

The Court erred in making its Finding of Fact No. VIII in that:

1. Said finding is not supported by the evidence.
2. Said finding is contrary to the evidence in that the evidence (Stipulation of Facts) shows that:

(a) At the time of its transportation the motor benzol was moving for storage, processing and sale and was, subsequent to its transportation, stored and processed.

(b) Subsequent to its transportation the motor benzol was sold by Defense Supplies Corporation for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline and of synthetic rubber, which was suitable for use in the manufacture or production of rubber products.

(c) Said motor benzol was used, in connection with other materials, in the manufacture or production of materials were suitable for use and used, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline suitable for military or naval use, and of synthetic rubber which was suitable for use and used in the manufacture or production of rubber products suitable for military or naval use.

(d) The United States bought a portion of the rubber products and the 100 octane aviation gasoline, of which the motor benzol ultimately became a constituent part, for use by the Army and Navy.

3. Said finding was induced by an erroneous view of the law in that said finding is based on the view that the use of the motor benzol, in connection with other materials, in the manufacture or production of materials suitable for use and used, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, was a military or naval use of the motor benzol.

III.

The Court's Conclusion of Law No. I is erroneous in that it is based on the erroneous Finding of Fact No. VII, and on the erroneous assumption, which is not supported by any evidence, that Defense Supplies Corporation had, at the time of transportation, only a naked legal title to the motor benzol, and in that it is contrary to the law and to

the evidence, as set forth hereinbefore in Paragraph I.

IV.

The Court's Conclusion of Law No. II is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

V.

The Court's Conclusion of Law No. III is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and on the erroneous Conclusions of Law Nos. I and II, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

VI.

The Court's Conclusions of Law No. IV is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and on the erroneous Conclusions of Law Nos. I, II and III, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

VII.

The Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "property of the United States" within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940, but was the property of and owned by Defense Supplies

Corporation, a corporate entity separate and distinct from the United States.

VIII.

The Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "military or naval" property of the United States within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940, but was only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline and synthetic rubber suitable for use in the manufacture or production of rubber products.

IX.

The Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "moving for military or naval and not for civil use" within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940, but was moving for storage, processing and sale, which are not military or naval uses within the meaning of the language in Section 321(a).

X.

The Court erred in failing to conclude that Defense Supplies Corporation was not entitled to make land-grant deductions from the applicable published tariff rates with respect to any of the transportation services provided by appellant and

other participating carriers in the transportation of the motor benzol involved in this case.

XI.

The Court erred in failing to conclude that appellant is entitled to recover from appellee the sum of \$23,049.51 and its costs herein incurred.

DESIGNATION

Appellant designates the entire record as certified by the District Court as necessary for consideration of the above points.

Dated this 12th day of June, 1946.

/s/ C. O. AMONETTE,

/s/ CHARLES W. BURKETT, JR.,

Attorneys for Appellant.

[Endorsed]: Filed June 12, 1946. Paul P. O'Brien, Clerk.

No. 11,352

United States
Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellee.

BRIEF FOR APPELLANT

C. O. AMONETTE,
CHARLES W. BURKETT, JR.,
65 Market Street,
San Francisco 5, California,
Attorneys for Appellant.

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United States
Circuit Court of Appeals
For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this action under 28 U.S.C.A., Sec. 41(8), which gives the District Courts of the United States jurisdiction "Of all suits and proceedings arising under any law regulating commerce," since this action arises under Section 6(7) and other sections of Part I of the Interstate Commerce Act (49 U.S.C.A., Sec. 6(7)). As appears from the complaint (Tr.

2-10), this action was brought by a carrier by railroad, subject to the Interstate Commerce Act, to recover the difference between the amount paid by Defense Supplies Corporation (hereinafter referred to as Defense Supplies) for transportation services from Seattle, Washington, and Los Angeles, California, and the amount of charges for such services based upon the applicable rates therefor contained in the duly filed and published tariffs.

The District Court also had jurisdiction of this action under 28 U.S.C.A., Sec. 41(1) in that it arises under a law of the United States and more especially under Section 321 of Title III, Part II, of the Transportation Act of 1940 (49 U.S.C.A., Sec. 65, set out in full in Appendix A hereto), and the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000. As appears from the complaint (Tr. 6-10), it involves the question whether motor benzol owned by Defense Supplies, a corporate instrumentality of the United States, was, at the time of transportation, military or naval property of the United States moving for military or naval and not for civil use within the meaning of Section 321(a).

The jurisdiction of the Circuit Court of Appeals to review the judgment of the District Court (Tr. 215) is based upon 28 U.S.C.A., Sec. 225, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sec. 345.

STATEMENT OF THE CASE

The facts were stipulated and the Stipulation provides that both parties may bring to the attention of the Court

any facts of which the Court may take judicial notice.

This action was brought by Southern Pacific Company (hereinafter referred to as Appellant) against Defense Supplies to recover the sum of \$23,049.51, being the difference between transportation charges in the aggregate amount of \$56,736.14, based on the duly published and filed rates, and the aggregate amount of \$33,686.63 paid by Defense Supplies for the transportation of a number of tank car shipments of motor benzol during the years 1942 and 1943, beginning in July, 1942, and ending in December, 1943, from Seattle, Washington to Los Angeles and Vernon, California (Vernon being within the Los Angeles switching limits) (Tr. 3-6).

Defense Supplies was, during all of the times relative to this case prior to July 1, 1945, a corporation duly created by Reconstruction Finance Corporation at the request of the Federal Loan Administrator with the approval of the President, pursuant to authority contained in Section 5d of the Reconstruction Finance Corporation Act, as amended (Tr. 32). A copy of the Charter as amended on February 15, 1941, and July 9, 1941, is a part of the Stipulation of Facts herein as Exhibit A (Tr. 53-57).

As of July 1, 1945, Defense Supplies was dissolved and Reconstruction Finance Corporation made subject to all liabilities of Defense Supplies, whether arising out of contract or otherwise (Public Law 109, approved June 30, 1945). On November 5, 1945, the District Court entered an order continuing this action against Reconstruction Finance Corporation and substituting the latter Corporation as defendant in the place and stead of Defense Supplies, as provided in Public Law 109 (Tr. 197).

From its Charter (Tr. 53-57) it appears that the total authorized capital stock of Defense Supplies was \$5,000,000, of which \$1,000,000 was to be paid in immediately and the balance as called. The stock was of one class, having a par value of \$100 per share, and to be issued for cash only. Reconstruction Finance Corporation was the owner of all the capital stock (United States owns all of the capital stock of Reconstruction Finance Corporation) and the "stockholder shall not be liable for the debts, contracts or engagements of the Corporation except to the extent of unpaid stock subscriptions." The "affairs and business of the Corporation shall be managed by a Board of Directors who shall be appointed by Reconstruction Finance Corporation" pursuant to the provisions of the Charter and By-Laws of the Corporation. One of the objects, purposes and powers of the Corporation was "To produce, acquire, carry, sell, or otherwise dispose of strategic and critical materials as defined by the President." It is stated in the Charter that "the Corporation shall be an instrumentality of the United States Government."

At all times material to this action the accounts of Defense Supplies were not audited, settled or adjusted by the General Accounting Office of the United States (Tr. 33).

A copy of the By-Laws of Defense Supplies is a part of the Stipulation of Facts herein as Exhibit B (Tr. 57-62). From the By-Laws it appears that the Corporation had a Board of Directors appointed by its stockholder, Reconstruction Finance Corporation, and an Executive Committee which possessed and exercised all of the power and authority of the Board of Directors at such time as

the Board of Directors was not in session. The Corporation had other officers such as a commercial business corporation usually has, that is, a Chairman of the Board of Directors, a President, one or more Vice Presidents, a Secretary, a Treasurer, a General Counsel, and such other officers and agents as the Board of Directors deemed advisable. The Treasurer of the Corporation had the custody of the corporate funds and securities and disbursed "the funds of the Corporation pursuant to the authority of the Board of Directors of the Corporation or Executive Committee."

On April 2, 1942, the War Production Board, by its letter of that date, recommended to Defense Supplies that it purchase 50,000,000 gallons of motor benzol for the purpose of storing such benzol and creating a stock pile thereof (Tr. 35-39). On April 7, 1942, the Executive Committee of Defense Supplies adopted a resolution which contained the following (Tr. 33):

"RESOLVED FIRST, That this corporation purchase and place in storage not to exceed 50,000,000 gallons of motor benzol at a price not in excess of 10¢ per gallon.

"RESOLVED SECOND, That the President or any Vice President be and hereby is authorized:

1. To enter into such agreements, approved by the General Counsel or counsel designated by him, as may be necessary to carry out the provisions of this resolution and the purchase referred to;
2. To make (or designate a person or persons to make) such other arrangements as may be deemed necessary or appropriate, including but not limited to transportation, insurance, storage, handling, production and disposition of such motor benzol."

The resolution contained a "Resolved Third" which authorized the Treasurer or an Assistant Treasurer, among other things "to disburse such funds of the Corporation as are required to be expended pursuant to any such agreements and arrangements" (Tr. 33).

Said resolution was amended by a resolution adopted by the Executive Committee of Defense Supplies on July 18, 1942, by striking from paragraph 2 in Resolved Second thereof the words "and disposition of such motor benzol" and substituting therefor the following "processing and disposition of such motor benzol and by-products resulting therefrom" (Tr. 34).

On September 21, 1942, the Executive Committee of Defense Supplies further amended the resolution adopted on April 7, 1942, by striking the Resolved First clause and inserting in lieu thereof the following (Tr. 34-35):

"RESOLVED FIRST, That this corporation purchase, store, and arrange for further processing and sale of not to exceed 50,000,000 gallons of motor benzol at a price not in excess of 16¢ per gallon."

Further resolutions were adopted by the Executive Committee of Defense Supplies from time to time further amending said resolution adopted on April 7, 1942, by increasing the quantity of benzol to be purchased and stored by the Corporation, and for which Defense Supplies was to arrange for further processing and sale, and by increasing the price which the Corporation was authorized to pay for benzol purchased (Tr. 35).

During the years 1942 and 1943, beginning in the month of July, 1942, Appellant, in participation with other interstate common carriers by railroad, at the request of

Defense Supplies, transported for and on behalf of that Corporation from Seattle, Washington to Los Angeles and Vernon, California (Vernon being within the tariff switching limits of Los Angeles), upon Government bills of lading prepared and furnished by the agent of Defense Supplies, a number of tank car shipments of motor benzol (Tr. 41). On each of said bills of lading Defense Supplies (Seattle Gas Company) was shown as shipper and consignor and Defense Supplies c/o Wilshire Oil Company, Inc., was shown as consignee (Tr. 41). The shipments involved in this suit consisted of 944,032 gallons, more or less, of motor benzol purchased and acquired by Defense Supplies from Seattle Gas Company, Seattle, Washington, during the period from June, 1942, to November, 1943, and at the time of said transportation said motor benzol was owned by and was the property of Defense Supplies (Tr. 42). Each purchase of motor benzol by Defense Supplies was made pursuant to allocations by the War Production Board and to notice of such allocations substantially in the form of a letter and attachment thereto (Tr. 42) made a part of the Stipulation of Facts herein as Exhibit C (Tr. 63-65).

The first purchase was made by telegram from Defense Supplies to Seattle Gas Company, dated June 27, 1942, a copy of which is made a part of the Stipulation of Facts as Exhibit D (Tr. 42, 66). The subsequent purchases were evidenced by letters from Defense Supplies to Seattle Gas Company with said company's acceptance endorsed thereon. A copy of one of these letters is made a part of the Stipulation of Facts as Exhibit E (Tr. 42, 67-68), and all of the other letters covering subsequent purchases were

in all respects similar to said Exhibit E except as to dates, quantity of benzol and price (Tr. 42-43). The various shipments of said benzol, upon arrival at destination, were stored for Defense Supplies at the Vernon tank farm of said Wilshire Oil Company, Inc., pursuant to a contract dated May 13, 1942, between Defense Supplies and Wilshire Oil Company, Inc., a copy of which said contract is made a part of the Stipulation of Facts as Exhibit F (Tr. 43, 68-73). In said contract of May 13, 1942, it is recited (Tr. 68-69):

“WHEREAS, Supplies [Defense Supplies Corporation] is engaged in purchasing motor benzol from manufacturers thereof who are unable to dispose of said benzol for uses permissible under Order M-137 of the War Production Board issued April 20, 1942, and is desirous of storing such benzol until such time as it may be allocated to various consumers thereof by the War Production Board.”

Order M-137, referred to in the preceding quotation is Conservation Order No. M-137 issued by the Director of Industry Operations of the War Production Board on April 20, 1942 (7 F.R. 2944; Tr. 41). This order related to the chemical compound known by the name benzene or by the name benzol, and took effect immediately upon issuance. This order imposed restrictions upon the use and upon the delivery of benzene. The order begins as follows:

“The fulfillments of requirements for the defense of the United States has created a shortage in the supply of benzene for defense, for private account and for export; and the following Order is deemed necessary and appropriate in the public interest and to promote the national defense.”

Conservation Order M-137 was amended on June 1, 1942 (7 F.R. 4172; Tr. 41). As amended the order imposed restrictions upon the use and delivery of benzene (benzol) and provided for the filing of applications for delivery of benzene (benzol) and the filing of reports by producers and distributors.

On July 23, 1943, the title to Conservation Order M-137 was amended to read "Allocation Order M-137" (8 F.R. 10350; Tr. 41). This order as amended also imposed restrictions on delivery and acceptance of delivery of benzene (benzol) and instructions on its use.

The first shipment of said motor benzol involved in this case arrived in said storage July 28, 1942, and the last on December 9, 1943 (Tr. 43).

Said shipments were billed and forwarded with charges collect and Appellant duly presented to Defense Supplies its respective bills aggregating the sum of \$56,736.14 for the transportation charges for said shipments, based on the duly published and filed rates for such transportation services (Tr. 44). Defense Supplies, however, claiming the right to make land-grant deductions (hereinafter explained) in amounts aggregating the sum of \$23,049.51, refused to make payments in the amount of \$56,736.14 for such transportation services but paid to Appellant amounts aggregating the sum of \$33,686.63, which was the aggregate amount of transportation charges payable to Appellant by Defense Supplies for said transportation services if said Corporation was entitled to land-grant deductions on the entire quantity of 944,032 gallons of benzol transported (Tr. 44). The amounts so paid were accepted by Appellant under protest as part payments only and

Appellant subsequently, and prior to the bringing of this action rendered its bills to Defense Supplies for the unpaid balances for said transportation charges for the sum of \$23,049.51 (Tr. 44).

Motor benzol is not suitable for use in the manufacture of cumene, ethyl benzene or styrene, processing and treatment of motor benzol being required to produce industrial pure benzol suitable for such use (Tr. 46). On October 16, 1943, Defense Supplies entered into a contract with Shell Oil Company, Inc., a copy of which contract is made a part of the Stipulation of Facts as Exhibit G (Tr. 46, 74-84), for the treatment and processing of motor benzol, described therein as untreated benzol, and thus produce industrial pure benzol at the Wilmington refinery of Shell Oil Company near Watson, California (Tr. 46). Under the same terms and conditions as contained in said contract, said 944,032 gallons more or less of motor benzol purchased and acquired by Defense Supplies from said Seattle Gas Company and stored for the Corporation at the Vernon tank farm of Wilshire Oil Company were treated and processed by said Shell Oil Company, Inc. (Tr. 47).

Defense Supplies made and entered into a contract with Wilshire Oil Company dated November 16, 1943, and a contract with Richfield Oil Corporation dated December 3, 1943, for the sale by it to said oil companies of industrial pure benzol to be used by said purchasers in the manufacture of cumene, for use by or as directed by the United States Government (Tr. 47). Under the terms of each contract the purchaser agreed to pay 17¢ per gallon f.o.b. tank cars or tank trucks at seller's storage, payment to be made in cash promptly upon receipt of seller's

invoices supported by evidence of the quantity shipped (Tr. 85, 87-88). A copy of each of these contracts is a part of the Stipulation of Facts as Exhibits H (Tr. 84-86) and I (Tr. 87-89), respectively.

Defense Supplies made and entered into a contract with Rubber Reserve Company, dated November 30, 1943, for the sale by it of industrial pure benzol to be used by said Company in the manufacture of styrene, for use by or as directed by the United States Government (Tr. 47). The price of the industrial pure benzol sold under said contract was 17¢ a gallon f.o.b. tank cars or tank trucks at seller's storage, payment to be made in cash promptly upon receipt of seller's invoice supported by evidence of the quantity shipped (Tr. 90). A copy of said contract is a part of the Stipulation of Facts as Exhibit J (Tr. 89-92).

Rubber Reserve Company was, during all of the times relative to this action prior to July 1, 1945, a corporation duly created by Reconstruction Finance Corporation at the request of the Federal Loan Administrator with the approval of the President, pursuant to authority contained in Section 5d of the Reconstruction Finance Corporation Act as amended (Tr. 47). It had a capital stock of \$5,000,000 consisting of 50,000 shares of the par value of \$100 each. This stock was of one class only, was non-assessable, and issued only for cash fully paid (Tr. 94). Reconstruction Finance Corporation was the owner of all the capital stock of Rubber Reserve Company (Tr. 94), and the United States in turn is the owner of the capital stock of Reconstruction Finance Corporation. A copy of the Charter of Rubber Reserve Company is a part of the Stipulation of Facts as Exhibit K (Tr. 92-

95). Under this Charter the stockholders are not liable for the debts, contracts, or engagements of the Corporation except to the extent of unpaid stock subscriptions, and the Charter provided that the Corporation shall be managed by its Board of Directors, officers or agents pursuant to the Charter and provisions of the By-Laws of the Corporation as prescribed by Reconstruction Finance Corporation (Tr. 95).

At all times material to this action the accounts of Rubber Reserve Company were not audited, settled, or adjusted by the General Accounting Office of the United States (Tr. 48).

Commencing in November, 1943, and continuing through August, 1944, Defense Supplies sold and delivered to said Wilshire Oil Company, Richfield Oil Corporation, and Rubber Reserve Company, industrial pure benzol processed and produced as aforesaid from said 944,032 gallons of motor benzol. Said sales were made pursuant to allocations by the War Production Board and to recommendations by the Petroleum Administration for War as to the benzol to be used in the manufacture of cumene and by the Office of Rubber Director as to the benzol to be used in the manufacture of styrene. Of the industrial pure benzol produced from said 944,032 gallons of motor benzol, 40.56% was sold to and delivered to Wilshire Oil Company and Richfield Oil Corporation under said contracts dated November 16, 1943 (Exhibit H, Tr. 84-86), and December 3, 1943 (Exhibit I, Tr. 87-89), for use in the manufacture of cumene (Tr. 48). Wilshire Oil Company and Richfield Oil Corporation manufactured cumene from the industrial pure benzol sold to them by combining said benzol with propylene to produce by chemical reaction cumene (Tr. 49).

The balance of said industrial pure benzol (59.44%) was sold and delivered by Defense Supplies to Rubber Reserve Company under said contract dated November 30, 1943 (Exhibit J, Tr. 89-92), for use in the manufacture of styrene (Tr. 49). Styrene is produced from ethyl benzene by chemical reaction in the presence of a catalyst. Ethyl benzene is produced by combining benzol with ethylene by chemical reaction. Rubber Reserve Company first produced ethyl benzene from the industrial pure benzol sold to said company by Defense Supplies. With that portion or quantity of ethyl benzene produced from 23.06% of the industrial pure benzol processed and produced as aforesaid from said 944,032 gallons of motor benzol, Rubber Reserve Company produced styrene. Pursuant to allocations by the Office of Rubber Director, the styrene so produced was sold by Rubber Reserve Company to rubber companies for use in the production of synthetic rubber. Said synthetic rubber was produced by combining, through chemical reaction, styrene and butadiene in the presence of a catalyst. Said rubber companies either used the synthetic rubber so produced to manufacture rubber products or sold it to other companies for the manufacture of rubber products. 42% of the rubber products manufactured as aforesaid was sold to the Army and Navy for their uses, and 58% of said rubber products was sold for civilian uses pursuant to allocations made by the War Production Board. 9.66% of the motor benzol involved in this action was used in the production of rubber products sold to the Army and Navy for their use, and 13.4% of the motor benzol involved in this action was used in the production of rubber products sold for such civilian use (Tr. 49-50).

The remainder of the ethyl benzene produced by Rubber Reserve Company, that is, that portion or quantity made from 36.38% of industrial pure benzol processed and produced as aforesaid from 944,032 gallons of motor benzol, was sold by Rubber Reserve Company at the request of the Petroleum Administration for War to refineries engaged in producing 100 octane aviation gasoline to be used by them in the manufacture of such gasoline for sale to Defense Supplies (Tr. 50). Said sales were evidenced by letter agreements in the form of Exhibit O, which is a part of the Stipulation of Facts (Tr. 51, 155-160).

Cumene and ethyl benzene are components of 100 octane aviation gasoline, by blending operations which comprise a physical mixture without chemical change. During the times herein mentioned subsequent to December, 1942, the manufacture, use and disposition of cumene and ethyl benzene were under the control and administration of the Petroleum Administration for War. Pursuant to allocations by said Administration the cumene manufactured by Wilshire Oil Company and Richfield Oil Corporation from the benzol sold to them by Defense Supplies as aforesaid, was used by said companies in the manufacture of 100 octane aviation gasoline produced by said companies and subsequently sold to Defense Supplies in accordance with the contracts (Exhibits M and N) hereinafter referred to (Tr. 51).

Pursuant to request of the Petroleum Administration for War, of the War Department, and of the Navy Department, Defense Supplies entered into a contract to purchase the production of 100 octane aviation gasoline manufactured by the various refineries, including Wilshire Oil

Company and Richfield Oil Corporation. The contracts entered into by Defense Supplies with Wilshire Oil Company and Richfield Oil Corporation, as in force and effect at all times herein mentioned, were dated December 20, 1943, and February 20, 1943, respectively (Tr. 49). Copies of said contracts, except the exhibits thereto, are a part of the Stipulation of Facts as Exhibit M (Tr. 102-127) and Exhibit N (Tr. 128-154), respectively.

The 100 octane aviation gasoline produced by Wilshire Oil Company and Richfield Oil Corporation by blending with cumene manufactured by said companies from benzol purchased by them from Defense Supplies as aforesaid, was purchased by Defense Supplies from said companies pursuant to said contracts dated December 20, 1943 and February 20, 1943 (Exhibits M and N). The 100 octane aviation gasoline produced by other refineries by blending with ethyl benzene manufactured by Rubber Reserve Company from the benzol purchased by said Company from Defense Supplies, was likewise purchased by Defense Supplies from said refineries pursuant to contracts similar to said Exhibits M and N (Tr. 51-52).

The 100 octane aviation gasoline so purchased by Defense Supplies was sold by that corporation to the Army and Navy pursuant to a contract executed as of May 20, 1943 by the War Department, the Navy Department, the Petroleum Administration for War, and Defense Supplies (Tr. 52). A copy of this contract, except the exhibits thereto, is a part of the Stipulation of Facts as Exhibit P (Tr. 52, 160-170). A copy of the contract of December 19, 1942 (referred to in said contract of May 20, 1943, Exhibit P), except exhibits thereto, is a part of the Stipulation of Facts as Exhibit Q (Tr. 52, 170-180).

The contract of May 20, 1943 (Exhibit P), was modified and extended by the contract of July 1, 1944, a copy of which contract, except certain provisions thereof not deemed material, is a part of the Stipulation of Facts as Exhibit R (Tr. 52, 180-188).

Under the terms of the contract of May 20, 1943, the amount of gasoline purchased by the Army and Navy from Defense Supplies was subject as to quantity and end user to determination and allocations of the Allied Petroleum Production Aviation Committee comprising representatives of the Army and Navy, Petroleum Administration for War, and the British Government, and as to refinery source to release by Petroleum Administration for War (Exhibit P, Tr. 161, 163). Deliveries of gasoline and passage of title from Defense Supplies to the Army or Navy at the refinery were considered as having been made when the gasoline passed through the intake pipe of the vessel, when a loaded tank car was turned over to a railroad, or when the loading of a truck was completed, as the case may be (Exhibit P, Tr. 164).

Both the Army and the Navy paid Defense Supplies for the gasoline purchased by them (Exhibit P, Tr. 162), and under the provisions of the contract of December 19, 1942 (Exhibit Q, Tr. 171), the War Department advanced to Defense Supplies \$34,000,000, and the Navy Department advanced to Defense Supplies \$66,000,000 to be applied as payment for gasoline to be acquired by each Department respectively from Defense Supplies.

Defense Supplies in its answer (Tr. 25-31) denied liability for the sum of \$23,049.51, claiming that it was entitled to make land-grant deductions in that amount from the aggregate amount of the transportation charges

on the ground that the motor benzol was, at the time of transportation, "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of Section 321(a), Title III, Part II, of the Transportation Act of 1940 (Act of September 18, 1940, c. 722, Sec. 321, 54 Stat. 954; 49 U.S.C.A. Sec. 65 in 1945 Annual Cumulative Pocket Part), which provides that:

"Notwithstanding any other provisions of law but subject to the provisions of Sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty * * *."

By granting public lands to various companies in the aid of the construction of their lines of railroad, the United States secured concessions from the established tariffs from the carriers so aided, that is, the United States secured the right, when Government property was transported, to make deductions from the duly filed and published tariff rates applicable generally to the kind of property transported for the Government. The amount to be deducted depended upon the land-grant aided mileage of the line of railroad over which said transportation services were performed.

Other railroads not aided by such grants, in order to participate in the transportation of Government property, entered into agreements with the United States, called equalization agreements, by which they agreed to carry freight routed over their lines at the lowest net rates available as derived through deductions on account of land-grant mileage or distance. The carriers by railroad participating in the transportation services involved in this case were either land-grant aided roads or had entered into such equalization agreements.

At the time of the passage of the Transportation Act of 1940 (approved on September 18, 1940), the United States was entitled to land-grant deductions from duly published filed rates on the transportation of all government-owned property over land-grant aided lines and over the lines of equalizing carriers. Land-grant aided carriers by railroad, however, became entitled to the benefits of Section 321(a) by release of certain claims against the United States to lands, interests therein, etc., as required by Section 321(b) of Title III, Part II, of the Transportation Act of 1940. Subsequent to the passage of the Transportation Act of 1940 and prior to the shipments involved in this case, each of the land-grant aided carriers by railroad participating in the transportation services performed, and each of the land-grant aided carriers by railroad with which any participating carrier had agreed to equalize, filed the release required by Section 321(b) of the Transportation Act of 1940 (Tr. 45) and thereby each carrier participating in the transportation services performed became entitled to charge the full applicable commercial rates, fares and charges for the transportation of property of the United States, or on its behalf,

except for the transportation of "military or naval property of the United States moving for military or naval and not for civil use." In other words, after the passage of the Transportation Act of 1940 and the filing of such releases, the right of the United States to make land-grant deductions from the full applicable tariff rates was limited to the transportation of "military or naval property of the United States moving for military or naval and not for civil use."

If, therefore, the motor benzol involved in this case was, at the time of its transportation, military or naval property of the United States moving for military or naval and not for civil use, Defense Supplies was entitled to make land-grant deductions from the full applicable published tariff rates on all of the transportation services involved in this case and Appellant is not entitled to recover. If, on the other hand, the motor benzol involved in this case was not, at the time of its transportation, military or naval property of the United States moving for military or naval and not for civil use, Defense Supplies was not entitled to such land-grant deductions on any of the shipments involved in this case, and Appellant is entitled to recover the sum of \$23,049.51.

The District Court found as facts: (1) that the motor benzol was, at the time of its transportation, owned by Defense Supplies (Finding No. VI, Tr. 213); (2) that the motor benzol was, at the time of its transportation, military or naval property of the United States (Finding No. VII, Tr. 213); and (3) that the motor benzol, at the time of transportation, was moving for use in the production of aviation gasoline and synthetic rubber for use in the direct prosecution of the war and was, at the time

of its transportation, moving for military or naval and not for civil use (Finding No. VIII, Tr. 213).

The Court concluded: (1) that the motor benzol, naked legal title to which, at the time of its transportation, stood in the name of Defense Supplies, a corporate instrumentality of the United States, was, at the time of its transportation, "property of the United States" within the meaning of that language as used in Section 321(a) of the Transportation Act of 1940 (Conclusion of Law No. I, Tr. 213); (2) that the motor benzol, at the time of its transportation, was "military or naval" property of the United States and was "moving for military or naval and not for civil use" within the meaning of that language as it is used in Section 321(a) in the Transportation Act of 1940 (Conclusion of Law No. II, Tr. 213); (3) that Defense Supplies was entitled to make land-grant deductions from the applicable published tariff rates under the provisions of Section 321(a) of the Transportation Act of 1940 for the transportation services in the transportation of the motor benzol (Conclusion of Law No. III, Tr. 214); and (4) that Appellant is entitled to recover nothing from Defense Supplies, and Defense Supplies is entitled to its costs of suit (Conclusion of Law No. IV, Tr. 214).

On February 28, 1946, judgment was entered for Defense Supplies (Tr. 215), and this is an appeal from that judgment.

SPECIFICATION OF ERRORS

The errors in the District Court upon which Appellant relies are as follows:

I.

The District Court erred in making its Finding of Fact No. VII in that:

1. Said finding is not supported by the evidence.
2. Said finding is contrary to the evidence in that the evidence (Stipulation of Facts) shows that:

(a) The motor benzol was purchased by and was, at the time of its transportation, the property of and owned by Defense Supplies, a corporate entity separate and distinct from the United States, and was not the property of the United States.

(b) The motor benzol was not, at the time of its transportation, military or naval property but only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline which, when manufactured or produced, was suitable for military or naval use and of synthetic rubber which, when manufactured or produced, was suitable for use in the manufacture or production of rubber products suitable for military or naval use.

(c) The United States bought a portion of the rubber products and the 100 octane aviation gasoline, of which the motor benzol ultimately became a constituent part, for use by the Army and Navy.

3. Said finding was induced by an erroneous view of the law in that:

(a) Said finding is based on the view that the motor benzol which was purchased by and was, at the time of its transportation, the property of and owned by Defense Supplies, a corporate entity separate and distinct from the United States, was the property of the United States.

(b) Said finding is based on the view that the motor benzol unsuitable at the time of its transportation for military or naval use, was, at the time of its transportation, military or naval property when materials manufactured or produced therefrom by purchasers of the motor benzol from Defense Supplies, subsequent to its transportation, were used, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, which property was acquired by the United States for military or naval use.

II.

The District Court erred in making its Finding of Fact No. VIII in that:

1. Said finding is not supported by the evidence.
2. Said finding is contrary to the evidence in that the evidence (Stipulation of Facts) shows that:

(a) At the time of its transportation the motor benzol was moving for storage, processing and sale and was, subsequent to its transportation, stored and processed.

(b) Subsequent to its transportation the motor benzol was sold by Defense Supplies for use, in con-

nection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline and of synthetic rubber, which was suitable for use in the manufacture or production of rubber products.

(c) Said motor benzol was used, in connection with other materials, in the manufacture or production of materials which were suitable for use and used, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline suitable for military or naval use, and of synthetic rubber which was suitable for use and used in the manufacture or production of rubber products suitable for military or naval use.

(d) The United States bought a portion of the rubber products and the 100 octane aviation gasoline, of which the motor benzol ultimately became a constituent part, for use by the Army and Navy.

3. Said finding was induced by an erroneous view of the law in that said finding is based on the view that the use of the motor benzol, in connection with other materials, in the manufacture or production of materials suitable for use and used, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, was a military or naval use of the motor benzol.

III.

The District Court's Conclusion of Law No. I is erroneous in that it is based on the erroneous Finding of Fact No. VII, and on the erroneous assumption, which is

not supported by any evidence, that Defense Supplies had, at the time of transportation, only a naked legal title to the motor benzol, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraph I.

IV.

The District Court's Conclusion of Law No. II is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

V.

The District Court's Conclusion of Law No. III is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and on the erroneous Conclusions of Law Nos. I and II, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

VI.

The District Court's Conclusion of Law No. IV is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and on the erroneous Conclusions of Law Nos. I, II and III, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

VII.

The District Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "property of the United States" within the meaning of that language as it is used in Section 321(a) of the Trans-

portation Act of 1940, but was the property of and owned by Defense Supplies, a corporate entity separate and distinct from the United States.

VIII.

The District Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "military or naval" property of the United States within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940, but was only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline and synthetic rubber suitable for use in the manufacture or production of rubber products.

IX.

The District Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "moving for military or naval and not for civil use" within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940, but was moving for storage, processing and sale, which are not military or naval uses within the meaning of the language in Section 321(a).

X.

The District Court erred in failing to conclude that Defense Supplies was not entitled to make land-grant deductions from the applicable published tariff rates with respect to any of the transportation services provided by

Appellant and other participating carriers in the transportation of the motor benzol involved in this case.

XI.

The District Court erred in failing to conclude that Appellant is entitled to recover from Appellee the sum of \$23,049.51 and its costs herein incurred.

ARGUMENT

THE MOTOR BENZOL WAS NOT PROPERTY OF THE UNITED STATES, BUT OF DEFENSE SUPPLIES, A CORPORATE ENTITY SEPARATE AND DISTINCT FROM THE UNITED STATES.

There is no evidence whatever in the case, and no evidence from which any reasonable inference can be drawn, that the motor benzol was, at the time of its transportation, property of the United States. In its answer, defendant, Defense Supplies, alleged "that said benzol was motor benzol which was purchased and acquired by defendant from Seattle Gas Company f.o.b. tank cars Seattle, Washington, prior to the transportation thereof as alleged in the complaint, and was owned by and the property of defendant at all times therein mentioned" (Tr. 27). This allegation is supported by the Stipulation of Facts as follows (Tr. 42):

"The shipments involved in this suit consisted of 944,032 gallons, more or less, of motor benzol purchased and acquired by defendant from Seattle Gas Company, Seattle, Washington, from time to time during the period from June, 1942 to November, 1943, and at the times of said transportation said motor benzol was owned by and was the property of defendant."

Defense Supplies was a corporation created by Reconstruction Finance Corporation and it had charter power "to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President" (Tr. 53).

In authorizing the purchase of the motor benzol Defense Supplies was evidently proceeding under this power. In its resolution authorizing the purchase of the motor benzol, the Executive Committee authorized the Treasurer or an Assistant Treasurer "to disburse such funds of the Corporation as are required to be expended" in purchasing, storing, and otherwise handling the motor benzol (Tr. 33-34). There is no evidence whatever in the case, and no evidence from which any reasonable inference can be drawn, that Defense Supplies purchased the motor benzol with funds appropriated by Congress for that purpose.

This is, therefore, not a case in which Defense Supplies merely held naked legal title to the motor benzol because of having purchased it with funds furnished by the United States. In such circumstances cases like *King County, Washington, et al. v. U. S. Shipping Board Emergency Fleet Corp.* (C.C.A. 9), 282 Fed. 950, are no authority for the position that the motor benzol was property of the United States. In the case referred to it was held that certain property to which the Emergency Fleet Corporation had title was not taxable because it was the property of the United States. The basis of that decision by this Court was that the Emergency Fleet Corporation merely held legal title to the property in question, that corporation acting as a naked trustee with the entire beneficial interest in the United States. This clearly appeared from the opinion (p. 953):

“Furthermore, it appears that this property was purchased, *not with money paid in for the capital stock of the Fleet Corporation, but with funds especially appropriated by Congress for the purpose, some time after the Fleet Corporation was fully organized.* Power to acquire shipyards is not to be found in the act providing for the creation of the Fleet Corporation. The acquisition of such property was for the first time authorized by the Act of November 4, 1918 (40 Stat., 1022 (Comp. St. Ann. Supp. 1919, Sec. 3115 1/16ddd)), and an appropriation of \$34,662,500 was made for that purpose. Clearly, in the matter of expending this public money, under the direction of Congress and the President, in the purchase of property for governmental purposes, *and in taking and holding the legal title thereto, the corporation was acting as a naked trustee, and the entire beneficial interest was in the government.* And what does it matter that the Fleet Corporation may, in a measure, have had the status of an ordinary corporation? Let us assume that it was purely a private concern, and originally had none of the attributes of a public agency, and then let us suppose that by Congress and the President, with its consent, public funds were placed in its custody, to be expended by it in the acquisition of shipyards for government uses, and it was authorized to take and hold the legal title thereto; would it be contended that such property continued to be subject to state taxation merely because the legal title was held by a private corporation having no real interest? The taxable character of property is to be referred to the status of the real, rather than of the nominal, owner. *Private property is not exempt from taxation because the government holds the legal title thereto, and by parity of reasoning neither is public property taxable because the naked legal title*

is in a private person. *Carroll v. Safford*, 3 How. 444, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall 210, 18 L. Ed. 339." (Emphasis supplied.)*

A like situation was presented in *U. S. Shipping Board Emergency Fleet Corp. v. Delaware County, Pa.* (C.C.A. 3), 17 F. (2d) 40, certiorari denied 278 U.S. 607, 73 L. Ed. 533, and the Court held that property, legal title to which was in Emergency Fleet Corporation, was not subject to taxation. The Court said (p. 40):

"It thus appears that not only was the legal title held by a corporate agency of the United States, but that the purchase price of the land in question was paid to the purchaser by the United States. In the light of such facts, and there being no suggestion of ownership or interest elsewhere, it is clear that the real ownership of the land was and is in the United States, and that the Fleet Corporation, the holder of the title, held such title as a mere legal holder for the benefit of the United States."

Thus, in this case we do not have a situation in which Defense Supplies merely held legal title to property with the beneficial interest in the United States. The evidence in this case shows without dispute that the benzol was purchased by and was, at the time of its transportation, the property of and owned by Defense Supplies.

Property of Defense Supplies was not property of the United States merely because the United States owned all of the capital stock of Reconstruction Finance Corporation, which in turn owned all of the capital stock of Defense Supplies. Defense Supplies was an entity separate

*Hereafter in this brief emphasis is supplied.

and distinct from the United States and from its departments or boards.

In *United States v. Strang*, 254 U.S. 491, 65 L. Ed. 368, the question involved was whether a person employed as an inspector by the Emergency Fleet Corporation was an agent of the United States within the meaning of Section 41 of the Criminal Code, which provides:

“Sec. 41. No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years.”

Strang was indicted on four counts, three of which charged that he unlawfully acted as agent of the United States in transacting business with the Duval Ship Outfitting Company, a co-partnership of which he was a member, in that while an employee of the Fleet Corporation as an inspector he signed and executed (February, 1919) three separate orders to the Outfitting Company for repairs and alterations on the steamship Lone Star. Counsel for the Government contended that the Fleet Corporation was an agency or instrumentality of the United States formed only as an arm for executing purely governmental powers and duties vested in the President and by him delegated to the corporation. Counsel for the Government

further contended that the acts of the Corporation within its delegated authority were the acts of the United States, and that therefore in placing orders with the Duval Company in behalf of the Fleet Corporation while performing the duties as inspector, Strang necessarily acted as agent of the United States. Demurrer to the indictments was sustained by the trial court. In holding that the demurrer was properly sustained, the Court said (p. 493):

“As authorized by the Act of September 7, 1916, c. 451, 39 Stat. 728, the United States Shipping Board caused the Fleet Corporation to be organized (April 16, 1917) under laws of the District of Columbia with \$50,000,000 capital stock, all owned by the United States, and it became an operating agency of that Board. Later, the President directed that the Corporation should have and exercise a specified portion of the power and authority in respect of ships granted to him by the Act of June 15, 1917, c. 29, and he likewise authorized the Shipping Board to exercise through it another portion of such power and authority. See *The Lake Monroe*, 250 U.S. 246, 252. The Corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. *Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officers designated by Congress; they were subject to removal by the Corporation only and could contract only for it. In such circumstances we think they were not agents of the United States within the true intentment of Sec. 41.*”

In *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 66 L. Ed. 762, one

of the questions involved was whether a claim in bankruptcy made by the Fleet Corporation in its own name as an instrumentality of the Government was entitled to priority. The claim arose under a contract entered into by the Fleet Corporation "representing the United States of America" with the Eastern Shore Shipbuilding Corporation, which became bankrupt, for the construction of six harbor tugs prior to the Merchant Marine Act of 1920. In holding that the Fleet Corporation was not entitled to priority, the Court said (p. 570):

"The third case, as we have said, is a claim of priority in bankruptcy. It was asserted against the estate of the Eastern Shore Shipbuilding Corporation, in the District Court for the Southern District of New York, under a contract similar to that last described, made by that Company with the Fleet Corporation 'representing the United States of America' to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the Government of the United States. *It was denied successively by the referee, the District Court and the Circuit Court of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred.* 274 Fed. 893. The considerations that have been stated apply even more obviously to this case. The order is affirmed."

In *Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 72 L. Ed. 131, a petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia in October, 1924, on the relation of Skinner & Eddy

Corporation to compel the Comptroller General of the United States to pass upon the claims of that Corporation against the Government. The claims arose under contracts made during the years 1917, 1918, and 1919 with the Fleet Corporation. In most of the contracts reference was made to the Fleet Corporation as "representing the United States." The claims were presented to the Comptroller General for allowance because Skinner & Eddy wished to be in a position to use them as a credit if the United States should, as was threatened, sue on the contracts. This course was deemed necessary because Sec. 951 of the Revised Statutes provided:

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed. . . ."

The Comptroller General declined to consider the claims on the ground that he had neither the duty nor the power, and that the duty of passing upon them rested with the Shipping Board. The Supreme Court, in affirming a judgment of the Court of Appeals of the District of Columbia, which affirmed the Supreme Court of the District in dismissing the petition for a writ of mandamus, described the character of the claims and set forth the character of the Fleet Corporation as follows (p. 10):

"The claims of Skinner & Eddy were mainly for the cancellation by the Fleet Corporation of contracts for the construction of vessels. The Government contends that the contract giving birth to the claims arose out of or was incident to the exercise by or

through the President of the powers conferred upon him by the statutes referred to in Sec. 2(c) of the Merchant Marine Act, 1920, and, hence, that the Shipping Board, and not the Comptroller General, has the power and duty to settle and adjust them and thus to allow or disallow any claims by way of credits or set-offs arising out of the contracts. Skinner & Eddy urge that their contracts were made by virtue of the power conferred upon the Fleet Corporation by the Shipping Act of 1916; that a controversy arising out of such contracts is not within Sec. 2(c) of the Merchant Marine Act, 1920; and that, hence, the Comptroller General had jurisdiction over its claims. We have no occasion to determine whether the contracts here in question were made under the original charter power of the Fleet Corporation or under the additional powers acquired by delegation from the President. Even if Sec. 2(c) has no application, because the contracts were not entered into pursuant to the power delegated by the President in 1917, it does not follow that the claims fall within the jurisdiction of the Comptroller General. *For the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards; and the audit and control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers except so far as control may be exerted by the Shipping Board.*''

In *Continental Bank v. Rock Island Ry.*, 294 U.S. 648, 79 L. Ed. 1110, one of the questions involved was whether Reconstruction Finance Corporation, in a reorganization of a railroad under Section 77 of the Bankruptcy Act, could take over and liquidate collateral accepted by it as

security for loans to the bankrupt. Section 5 of the Reconstruction Finance Corporation Act, under the authority of which the loans were made, expressly empowered Reconstruction Finance Corporation to take over and liquidate collateral accepted by it as security for loans. In holding that Reconstruction Finance Corporation was not entitled to take over and liquidate the collateral accepted by it as security, the Court said (p. 684):

“The Reconstruction Finance Corporation contends that Secs. 77 and 2(15) of the Bankruptcy Act must be limited by the provisions of Sec. 5 of the Reconstruction Finance Corporation Act (c. 8, 47 Stat. 5), which empowers the corporation to take over and liquidate collateral accepted by it as security. *The Reconstruction Finance Corporation Act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is none the less a corporation, limited by its charter and by the general law. The act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations in the event of proceedings under the Bankruptcy Act. The provisions and principles of enforcement of the Bankruptcy Act, including Sec. 77, are binding upon the Reconstruction Finance Corporation, in the absence of some pertinent statutory exception, as they are upon other corporations.*”

In *Reconstruction Finance Corp. v. Menihan*, 312 U.S. 81, 85 L.Ed. 595, the question involved was whether costs of suit could be allowed against Reconstruction Finance Corporation when that Corporation was the unsuccessful litigant in suit. In holding that Reconstruction Finance Corporation was liable for such costs, the Court said (p. 83):

“Rule 54(d) of the Rules of Civil Procedure provides that ‘costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.’ This provision was merely declaratory and effected no change of principle.

“The Reconstruction Finance Corporation is a corporate agency of the government, which is its sole stockholder. 47 Stat. 5; 15 U.S.C. 601. It is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. The Corporation has wide powers and conducts financial operations on a vast scale. *While it acts as a governmental agency in performing its functions* (see *Pittman v. Home Owners’ Loan Corp.*, 308 U.S. 21, 32, 33), *still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign. Sloan Shipyards Corp. v. United States Fleet Corporation*, 258 U.S. 549, 566, 567.”

In *Cartwright v. United States* (C.C.A. 5), 146 F. 2d 133, Cartwright was indicted, and convicted of stealing property of the United States under 18 U.S.C.A., Sec. 82, which makes it an offense to steal “any property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder.” Section 82 was amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015, to include “or any corporation in which the United States of America is a stockholder.” Cartwright was indicted for stealing property of the United States, but the proof showed that the property belonged to Defense Plant Corporation. The Court, in reversing the judgment of conviction, held (p. 135):

“While therefore, the proof shows that an offense has been committed within the purview of Sec. 82, that is a taking of property of a corporation in which the United States is a stockholder, it shows also that that offense was not the offense charged in the first count, ‘taking property of the United States.’ The government’s position that this is a mere technicality since the United States beneficially owned the stock of the corporation, and, therefore, must be considered to be the owner of its property, will not at all do. *The indictment statute recognizes, as the law generally does, the distinction between a corporation and the owners of its stock. The government, having chosen to allege that the property stolen was the property of the United States, did not discharge its burden of proof by showing as it did here, that it was not such property, but that, on the contrary, it belonged to the Defense Plant Corporation. For the same reason it must be held that it failed to discharge its burden under Count 2 which charged that the concealed property was property of the United States, while the proof showed that it belonged to the corporation.*”

Defense Plant Corporation, like Defense Supplies, was created (6 F.R. 2971) by Reconstruction Finance Corporation pursuant to authority contained in Section 5d of the Reconstruction Finance Corporation Act, as amended.

At the time of the passage of the Transportation Act of 1940 (approved September 18, 1940), which includes Section 321(a), Congress had recognized, in statutes other than the one referred to in the case last cited, the distinction between the United States and its corporate instrumentalities and between the property of the United

States and that of such instrumentalities. This is discussed *infra*, pages 66-69 and some of the statutes are set out in Appendix B to this brief.

It is clear from the decisions that Defense Supplies, prior to its dissolution, was a corporate entity separate and distinct from the United States and from any of its departments or boards, and that the United States as owner of the stock of Reconstruction Finance Corporation, which in turn owned the stock of Defense Supplies, was not the owner of the property of Defense Supplies. While Defense Supplies was an instrumentality of the United States, as said in *Continental Bank v. Rock Island Ry.*, *supra*, "it is none the less a corporation, limited by its charter and by the general law." And as said in *Reconstruction Finance Corp. v. Menihan*, *supra*, "its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign." In fact, the transactions of Defense Supplies in buying and selling motor benzol and other commodities were more akin to those of private corporations than the activities of Reconstruction Finance Corporation.

There is nothing in its Charter or in the law under which it was created which makes property of Defense Supplies property of the United States. In fact, under the law (Reconstruction Finance Corporation Act) authorizing Reconstruction Finance Corporation to create Defense Supplies and other corporations, Congress evidently, because of the decisions hereinbefore referred to, recognized that property of Defense Supplies and similar corporations was not property of the United States because Congress specifically authorized the exemption of Defense

Supplies and its property, except real estate, from taxation. Property of the United States is exempt from taxation without any such law. The exemption provisions are embodied in Section 10 of the Reconstruction Finance Corporation Act as amended by the Act of June 10, 1941, 55 Stat. 248. The exemption provisions are included in 15 U.S.C.A., Section 610 (in 1945 Cumulative Annual Pocket Part), which Section, so far as here pertinent, provides:

“The corporation [Reconstruction Finance Corporation], including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company, the Rubber Reserve Company, and any other corporation heretofore or hereafter organized or created by the Reconstruction Finance Corporation under section 606b of this title, as amended, to aid the Government of the United States in its national-defense program, * * *. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction

Finance Corporation or by any corporation referred to in clause (1), (2) or (3) of the preceding sentence, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes. As amended June 10, 1941, c. 190, Sec. 3, 55 Stat. 248."

Likewise, under the general law the property of Defense Supplies was the property of that Corporation and not the property of its stockholder. See *Klein v. Board of Supervisors*, 282 U.S. 19, 75 L.Ed. 140, in which case the Court held (p. 24):

"The appellant, pursuing his notion that shares of stock represent an interest in the property of the corporation, insists that if taxed at all he should be taxed only in the ratio of the property in the State to the entire property of the corporation; that to tax him for the whole value is to tax property outside of the jurisdiction of the State. *But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members. Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273. *The stockholders in some circumstances can call on the corporation to account, but that is a very different thing from having an interest in the property by means of which the corporation is enabled to settle the account.*"

In *Rhode Island Trust Co. v. Doughton*, 270 U.S. 69, 70 L.Ed. 475, the Court stated the rule as follows (p. 81):

"The owner of the shares of stock in a company is not the owner of the corporation's property. He

has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. *But he does not own the corporate property."*

The United States saw fit to create Defense Supplies because of the advantages inherent in doing business through corporations, and in such circumstances if there are any inherent disadvantages in such method of doing business those disadvantages should be assumed along with the advantages. Neither the corporation thus created, nor its stockholder should be heard to deny that it is a corporate entity separate and distinct from the United States as a means of escaping its obligations. Compare *Schenley Distillers Corp. v. United States*, decided January 2, 1946, 90 L.Ed. 217 (Advance Opinions No. 5), in which case the Court held (p. 219):

"While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public."

To paraphrase what was held in *Reconstruction Finance Corp. v. Menihan, supra*, while Defense Supplies acted as a governmental agency in performing its functions, still its transactions were akin to those of private enterprises and the mere fact that it was an agency of the Government did not extend to it the immunities and privileges of the sovereign. It had only such immunities and privileges of the sovereign as Congress saw fit to grant it. Congress saw fit to grant it the immunity of the sovereign from taxation, but Congress did not grant it the immunity of the sovereign from paying full commercial rates for the transportation of its property.

**THE MOTOR BENZOL WAS NOT MILITARY OR NAVAL
PROPERTY OF THE UNITED STATES**

Under the preceding heading it was shown that the motor benzol was not the property of the United States. Under the facts, the motor benzol involved in this case was not, at the time of its transportation, "military or naval property" regardless of whether it was owned by the United States or not. It was at most a strategic or critical material suitable for use in connection with other materials in the manufacture or production of cumene and ethyl benzene which were suitable for use in connection with still other materials, in the production or manufacture of 100 octane aviation gasoline, and for use in connection with still other materials in the manufacture or production of styrene, which in turn was suitable for use, in connection with still other materials, in the manufacture or production of synthetic rubber.

As to the motor benzol involved in this case, which ultimately found its way into or became a component or

constituent of 100 octane aviation gasoline, the following steps were taken:

Defense Supplies had to have the benzol processed to get industrial pure benzol because motor benzol is not suitable for use in the manufacture of cumene or ethyl benzene (Tr. 46). 40.56% of the industrial pure benzol produced by processing was sold by Defense Supplies to Wilshire Oil Company and Richfield Oil Corporation to be used in the manufacture of cumene (Tr. 48-49). Those companies manufactured cumene by combining the pure benzol with propylene to produce by chemical reaction cumene (Tr. 49). The cumene thus produced was used by them to produce 100 octane aviation gasoline by combining the cumene with another component or other components by blending operation, thereby producing 100 octane aviation gasoline (Tr. 51). The gasoline thus produced was sold by Wilshire Oil Company and Richfield Oil Corporation to Defense Supplies (Tr. 51), and the latter corporation sold some of the 100 octane gasoline to the Army and some of it to the Navy (Tr. 52). The balance of the industrial pure benzol (59.44%) was sold by Defense Supplies to Rubber Reserve Company to be used in the manufacture of styrene (Tr. 49). Rubber Reserve Company had to make ethyl benzene first, which is accomplished by combining benzol with ethylene by chemical reaction (Tr. 49). Rubber Reserve Company sold a portion of this ethyl benzene (the quantity produced from 36.38% of the industrial pure benzol processed and produced from the 944,032 gallons of motor benzol transported) to refineries engaged in producing 100 octane aviation gasoline for use in producing such gasoline (Tr. 50). Those refineries produced 100 octane aviation gasoline by com-

bining the ethyl benzene with another component or other components by blending operations, thereby producing 100 octane aviation gasoline and they sold the gasoline thus produced to Defense Supplies (Tr. 51). The latter Corporation sold a part of this 100 octane aviation gasoline to the Army and a part of it to the Navy (Tr. 52).

As to the motor benzol in this case, which ultimately found its way into or became a component or constituent of rubber products, the following steps were taken:

Defense Supplies had to have the benzol processed to get industrial pure benzol because motor benzol is not suitable for use in the manufacture of ethyl benzene or styrene (Tr. 46). Defense Supplies sold to Rubber Reserve Company 59.44% of the industrial pure benzol obtained by processing the motor benzol (Tr. 49). Rubber Reserve Company first produced ethyl benzene by combining the benzol with ethylene by chemical reaction (Tr. 49). A portion of the ethyl benzene was used in the production of 100 octane gasoline as stated in the preceding paragraph (Tr. 50). The balance of the ethyl benzene (the quantity produced from 23.06% of the industrial pure benzol processed and produced from the 944,032 gallons of motor benzol transported) was used by Rubber Reserve Company in producing styrene, which is produced from ethyl benzene by chemical reaction in the presence of a catalyst (Tr. 49-50). The styrene thus produced was sold by Rubber Reserve Company to rubber companies for use in the production of synthetic rubber (Tr. 50). Synthetic rubber was produced by combining through chemical reaction styrene and butadiene in the presence of a catalyst (Tr. 50). The rubber companies either used the synthetic rubber to manufacture rubber products, or

sold it to other companies for the manufacture of rubber products (Tr. 50). The manufacturers of rubber products sold part of them to the Army and a part to the Navy (42% of the products to the Army and Navy) for their use, and the balance (58%) was sold for civilian use (Tr. 50).

In the circumstances here presented the motor benzol was not, at the time of its transportation, "military or naval property" regardless of whether it was owned by the United States or not. In fact, it never was military or naval property of the United States—it was merely a material which ultimately became a part of property subsequently acquired by the United States for military or naval use. The products of which the motor benzol ultimately became a part were military or naval property of the United States only after such products were acquired by the United States through its War and Navy Departments for the use of the Army and Navy respectively, with money appropriated by Congress for that purpose. In other words, when the War and Navy Departments purchased the 100 octane aviation gasoline from Defense Supplies the 100 octane aviation gasoline became military and naval property of the United States. Likewise, when the War and the Navy Departments purchased the rubber products, of which a portion of the motor benzol ultimately became a constituent part, for their use, with money appropriated by Congress for that purpose, such products became military and naval property of the United States.

Under Article I, Section 8, Clauses 12 and 13, respectively, of the Constitution of the United States, Congress is empowered "to raise and support Armies, but no Ap-

propriation of Money to that Use shall be for a longer Term than two Years," and "To provide and maintain a Navy."

In pursuance of this power Congress from time to time makes appropriations to raise and support armies and to provide and maintain a navy. By these appropriations, Congress provides money for the purpose of acquiring military property for the Army and naval property for the Navy. The appropriation acts are in great detail, appropriations being made for the various branches of service in the Army, and for the various branches of service in the Navy. For example, as to the Navy, see Naval Appropriation Act of 1944 (57 Stat. 197-218) making appropriations for the Navy Department for the fiscal year ending June 30, 1944; and as to the Army, see Military Appropriation Act 1944 (57 Stat. 347-370), making appropriations for the Military Establishment for the fiscal year ending June 30, 1944. Included in the Naval Appropriation Act is an appropriation of \$4,583,725,000 for "Bureau of Aeronautics," "Aviation, Navy" (57 Stat. 206), and included in the Military Appropriation Act is an appropriation of \$23,655,481,000 for the "Air Corps," "Air Corps, Army" (57 Stat. 356).

10 U.S.C.A., Section 1191 provides:

"All purchases and contracts for supplies or services for the military service shall be made by or under the direction of the chief officers of the Department of War. And all agents or contractors for supplies or services as aforesaid shall render their accounts for settlement to the accountant of the proper department for which such supplies or services are required, subject, nevertheless, to the inspection and revision of the General Accounting Office."

There is a similar provision governing purchases and contracts for supplies or services for the naval service. See 34 U.S.C.A., Section 560. The authority conferred by the sections referred to is subject to certain limitations such as the necessity of advertisement for bids. See 10 U.S.C.A., Section 1201 and 34 U.S.C.A., Section 561.

Of course the United States can acquire military or naval property through any department or agency authorized by Congress to acquire such property with money appropriated by Congress for that purpose. Congress, however, appropriated money to the War Department or Military Establishment for the purpose of acquiring military property for military use, and it appropriated money to the Navy Department or Naval Establishment for the purpose of acquiring naval property for naval use, and Congress has also designated those who shall have authority to make purchases of supplies and other property for the Military and Naval Establishments.

By Executive Order No. 9001 (6 F.R. 6787), dated December 27, 1941, the President removed restrictions upon the authority of the Secretary of War and the Secretary of the Navy to enter into contracts. This Executive Order, so far as is pertinent to this discussion, is as follows:

“1. By virtue of the authority in me vested by the Act of Congress, entitled ‘An Act to expedite the prosecution of the War effort,’ approved December 18, 1941, (hereinafter called ‘the Act’) and as President of the United States and Commander-in-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are

authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modification of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. *The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.*

“2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.”

Thus, by Executive Order 9001 the Secretary of War and the Secretary of the Navy were authorized, within the limits of the amounts appropriated therefor, to enter into contracts for the purchase of military and naval property for their respective Departments without observing the usual formalities and restrictions applicable to the purchase by them or their Departments of such military or naval property. In addition the Secretary of War and the Secretary of the Navy may exercise the authority conferred or they may, in their discretion, authorize any other officer or officers or civilian officials of the War or the Navy Department, respectively, to exercise such authority. Neither the Secretary of War nor the Secretary of the Navy was authorized to delegate to Defense Supplies the authority conferred upon him by Executive Order No. 9001.

It appears from the facts in this case that the contract of May 20, 1943, under which the War and Navy Departments acquired the 100 octane aviation gasoline, of which a portion of the motor benzol involved in this case ultimately became a constituent or component, was signed for the War Department by the Under Secretary of War and for the Navy Department by the Under Secretary of the Navy (Tr. 170). In so far as the rubber products, of which a portion of the motor benzol involved in this case became an element or component part, it appears that they were acquired direct from the rubber manufacturers by the War and Navy Departments and not through Defense Supplies (Tr. 50).

In the circumstances here presented the 100 octane aviation gasoline, of which a portion of the motor benzol in

this case became a constituent part, was not military or naval property of the United States until it was purchased by the United States through its War and Navy Departments from Defense Supplies for the use of the Army and the Navy. Likewise, the rubber products, of which a portion of the motor benzol ultimately became a constituent part, did not become military or naval property of the United States until they were purchased by the United States through its War and Navy Departments from the manufacturers for military and naval use.

The fact that the disposition and use of motor benzol was subject to Conservation Order M-137 (Tr. 41); that the manufacture, use and disposition of cumene and ethyl benzene were under the control and administration of the Petroleum Administration for War (Tr. 51); that the purchase of gasoline by the Army and Navy from Defense Supplies was subject, as to quantity and end user to determinations and allocations by the Allied Petroleum Products Aviation Committee and as to refinery source, to release by Petroleum Administration for War (Tr. 163); that industrial pure benzol was sold by Defense Supplies to Wilshire Oil Company and Richfield Oil Corporation for the manufacture of cumene for use as directed by the United States Government (Tr. 86, 88); and that industrial pure benzol was sold by Defense Supplies to Rubber Reserve Company for the manufacture of styrene for use as directed by the United States Government (Tr. 91), is without significance in determining whether the motor benzol was, at the time of its transportation, military or naval property of the United States. It is a matter of common knowledge that the Government, during the

war subjected the sale, delivery and use of many commodities to restrictions such as were imposed upon the disposition and use of motor benzol (benzene). Many of these commodities were just as important to the war effort as motor benzol and many were less important. The Federal Register contains many general conservation orders, allocation orders, limitation orders, and preference orders. There were hundreds of such orders in the Federal Register and they were designed to control the sale, delivery, and use of the articles and commodities covered thereby just as Conservation Order M-137 was designed to control the sale, delivery and use of motor benzol. For the purpose of indicating the wide scope of these orders, reference is made here to several of them.

As General Conservation Order M-137 imposed restrictions upon the delivery and use of benzene or benzol, so General Conservation Order M-126 (7 F.R. 3364) imposed restrictions upon the use of iron and steel. This Order, like Order M-137 dealing with motor benzol, began as follows:

“The fulfillment of requirements for defense of the United States has created a shortage in the supply of iron and steel for defense, for private account and for export; and the following Order is deemed necessary and appropriate in the public interest and to promote the national defense.”

Conservation Order M-145 dealt with cocoa and imposed restrictions upon the processing of cocoa beans and upon the delivery and use of any material produced from cocoa beans in connection with the production for sale of a number of products. This order as amended December 5, 1942 (7 F.R. 10213), began as follows:

“The uncertainty of shipments of cocoa beans from abroad and the fulfillment of requirements for the defense of the United States have created a shortage of the supply of cocoa beans for defense, for private account, and for export; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.”

Conservation Order M-111, dealing with tea, illustrates just how far the Government went in imposing restrictions. This Order, as amended on January 7, 1943 (8 F.R. 313), began as follows:

“The uncertainty of shipments of tea from abroad and the fulfillment of requirements for the defense of the United States have created a shortage of the supply of tea for defense, for private account, and for export, and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.”

Paragraph (c) of Section 1134.1 imposed general restrictions as follows:

“(c) General restrictions. (1) No packer shall accept delivery of tea or deliver tea packed by him or in bulk, except as permitted by this order.

“(2) No wholesale receiver shall accept delivery of tea from any person nor resell tea, except as permitted by this order.

“(3) No person shall accept delivery of tea from any packer, and no person shall deliver tea to any packer or wholesale receiver, with knowledge or reason to believe that such packer is not entitled to deliver, or that such packer or wholesale receiver is not entitled to accept delivery of, such tea pursuant to this order.

“(4) Every packer and every wholesale receiver shall sell tea equitably to purchasers and shall not favor purchasers who buy other products from them nor discriminate against purchasers who do not buy other products from them.”

There were other restrictions imposed by this order, including quota restrictions and exceptions thereto, and restrictions on inventories. Paragraph (h) contained a limitation on the size of packages as follows:

“No packer shall pack tea for sale at retail in a package or container containing more than one-fourth of one pound of tea.”

and also a limitation of the size of tea bags or tea balls.

It is not practicable within the limits of this brief to show fully the scope of the limitations and restrictions imposed by the United States upon the sale, delivery and use of most materials and commodities. The mere enumeration of the materials and commodities subject to limitations and restrictions as to sale, delivery and use similar to those applicable to motor benzol (benzene), and the various conservation orders, allocation orders, limitation orders, preference orders, and directives applicable to them, would take too much space to be included in this brief. The particular orders referred to, however, serve to show in a general way the scope of the control exercised by the United States over the sale, delivery and use of materials and commodities which had some relation to the defense effort, and they also serve to show that these limitations and restrictions have no significance in determining whether property is military or naval property.

THE MOTOR BENZOL WAS NOT, AT THE TIME OF ITS TRANSPORTATION, MOVING FOR MILITARY OR NAVAL USE

The Stipulation of Facts shows that the motor benzol, at the time of transportation, was not moving for military or naval use. The Executive Committee of Defense Supplies, by its resolution, authorized the purchase and storage of the motor benzol, and the making of arrangements for the "processing and disposition of such motor benzol and by-products resulting therefrom" (Tr. 33-34). After the motor benzol was transported it was stored under the terms of a contract between Defense Supplies and Wilshire Oil Company (Tr. 43). It was then processed to get industrial pure benzol, which was suitable for use, along with other components or elements, in the manufacture of cumene or ethyl benzene (Tr. 46). After it was processed Defense Supplies sold the industrial pure benzol (Tr. 47). Neither the storage nor processing nor sale of the motor benzol was a military or naval use of it. The sale of property and the use of property are entirely different transactions. This has been emphasized particularly in connection with sales and use taxes. See *McLeod v. Dillworth Company*, 322 U.S. 327, 88 L. Ed. 1304, in which case the Court held (p. 330):

"A *sales tax* and a *use tax* in many instances may bring about the same result. *But they are different in conception, are assessments upon different transactions*, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds."

The Court also held (p. 331):

"Though *sales and use taxes* may secure the same revenues and serve complementary purposes, *they are*,

as we have indicated, taxes on different transactions . . . ”

The facts show that the motor benzol was not suitable for military or naval use and was never put to either military or naval use. Therefore, there was no movement of the motor benzol for military or naval use. The motor benzol had to be processed to get industrial pure benzol, which was a material suitable for use, in connection with other materials, in the manufacture or production of cumene and ethyl benzene (Tr. 46). Cumene is produced by combining industrial pure benzol with propylene by chemical reaction (Tr. 49). Ethyl benzene is produced by combining benzol with ethylene by chemical reaction (Tr. 49). Styrene is produced from ethyl benzene by chemical reaction in the presence of a catalyst (Tr. 49). Cumene and ethyl benzene are components of 100 octane aviation gasoline by blending operations which comprise a physical mixture without chemical change (Tr. 51). Synthetic rubber is produced by combining, through chemical reaction, styrene and butadiene in the presence of a catalyst (Tr. 50).

There was no property suitable for military or naval use prior to the manufacture or production of 100 octane aviation gasoline and of rubber products from the synthetic rubber. The 100 octane aviation gasoline and the manufactured rubber products became military or naval property of the United States only when they were purchased by the United States through its War and Navy Departments for use by the Army and Navy. When the aviation gasoline and rubber products, of which the motor benzol ultimately became a constituent part, were acquired

by the United States through its War and Navy Departments for their use, the transportation of the aviation gasoline and the rubber products thereafter for use of the Army and Navy was a movement of military or naval property for military or naval use.

Assuming, however, that the movement of a material, in itself unsuitable for military or naval use, for storage, processing and sale to others for use by them, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, is a movement for use, it would obviously not be a movement for military or naval use. The storage of a material, unsuitable for military or naval use, is not a military or naval use of the material. Likewise, processing of such material to get a material, still unsuitable for military or naval use, is not a military or naval use of the material. Also, the sale of the material resulting from the processing was not a military or naval use of the processed material even though such material was used by the purchaser, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, which property was ultimately acquired by the United States for military or naval use.

THE MOTOR BENZOL WAS NEITHER "PROPERTY OF THE UNITED STATES" NOR "MILITARY OR NAVAL PROPERTY OF THE UNITED STATES" AND IT WAS NOT "MOVING FOR MILITARY OR NAVAL USE" WITHIN THE MEANING OF THAT LANGUAGE AS USED IN SECTION 321(a).

On September 18, 1940, the Transportation Act of 1940, which includes in Title III, Part II, Section 321 (Act of

September 18, 1940, c. 722, 54 Stat. 954; 49 U.S.C.A., Sec. 65 in 1945 Cumulative Pocket Part), was approved. Section 321(a), so far as it is pertinent to this discussion, provides:

“Notwithstanding any other provision of law, but subject to the provisions of sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; . . .”

By Section 321(b) carriers by railroad aided by land grants received from the United States are not entitled to the benefits of Section 321(a) unless and until they have filed releases of certain claims against the United States in the form and manner prescribed by the Secretary of the Interior. Each of the land-grant aided carriers participating in the transportation of the motor benzol involved in this case, as well as each of the land-grant aided carriers with which any of the participating carriers agreed to equalize the lowest net rates lawfully available as derived through deductions on account of land-grant mileage or distance, filed such release prior to the shipments of motor benzol (Tr. 45). Therefore each of the carriers participating in the transportation involved in this case was entitled to the benefits of Section 321(a).

By Section 321, Title III, Part II, of the Transportation Act of 1940, the United States made a proposal to each carrier by railroad whose lines were constructed as a whole or in part with the aid of grants of land received from the United States either directly or through a predecessor or predecessors in interest, and each of the carriers by railroad whose lines were so constructed accepted the proposal by filing the releases in the manner and form required by Section 321(b). Upon acceptance of this proposal there resulted a contract between each of such carriers by railroad and the United States, under the terms of which each of said carriers became entitled to the full applicable commercial rates, fares and charges for transportation of any persons or property for the United States, or on its behalf, other than "military or naval property of the United States moving for military or naval and not for civil use."

In *United States v. Northern Pacific Ry. Co.*, 256 U.S. 51, 65 L. Ed. 825, the Court, referring to the Northern Pacific Railroad Act of July 2, 1864 (13 Stat. 365), and the Joint Resolution of May 31, 1870 (16 Stat. 378), held (p. 63):

"The purpose of the granting act and resolution was to bring about the construction and operation of a line of railroad extending from Lake Superior to Puget Sound and Portland through what then consisted of great stretches of homeless prairies, trackless forests and unexplored mountains, and thus to facilitate the development of that region, promote commerce, and establish a convenient highway for the transportation of mails, troops, munitions and public stores to and from the Pacific coast, with all the resultant advantages to the Government and the

public. To that end the act and resolution embodied a proposal to the company to the effect that if it would undertake and perform that vast work it should receive in return the lands comprehended in the grant. The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the Government."

In the case last cited the Government made grants of land in aid of construction in consideration of receiving concessions from established tariffs. By Section 321 the Government surrendered in part concessions from established tariffs in consideration of the carriers releasing certain rights and claims to the Government. In each case there resulted contracts obligatory both on the carriers and on the Government. The resulting contracts are binding on the United States and it cannot, without the consent of the interested carriers, change the terms of these contracts by any subsequent legislation. See *United States v. Central Pacific R.R. Co.*, 118 U.S. 235, 238, 30 L. Ed. 173.

In *United States v. Galveston, etc. Ry. Co.*, 279 U.S. 401, 73 L. Ed. 760, the Court stated the rule to be applied in construing contracts of this character. In that case the question involved was whether the Government was entitled to the benefit of land-grant deductions from tariff rates for the transportation of authorized mounts furnished by army officers and transported at the expense of the United States. It was held that such mounts were not property of the United States within the meaning of the land-grant acts, and that the Government was not en-

titled to deductions on account of land grants from the regular tariff rates. In so holding the Court said (p. 404) :

“The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. *The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction.*”

In *Lake Superior and M. R.R. Co. v. United States*, 93 U.S. 442, 23 L. Ed. 965, the terms of the obligation were “sensibly and fairly read according to the words employed and not expanded or restricted by construction.” In that case the question involved was whether the Government was entitled to have troops or property transported over the railroad by the railroad company free of charge under a provision in an act of Congress granting lands to aid in the construction of the railroad, that “said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charges, for the transportation of any property or troops of the United States.” It was held that the reservation in question secured to the Government only the free use of the railroad concerned and that it did not entitle the Government to have troops or property transported by the railroad company over its railroad free of charge. In so holding the Court said (p. 454) :

“It might be very convenient for the government to have more rights than it has stipulated for; but we are on a question of construction, and on this ques-

tion the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable."

The terms of the obligation were "sensibly and fairly read according to the words employed and not expanded or restricted by construction" when in *Southern Pacific Co. v. United States*, 285 U.S. 240, 76 L. Ed. 736, it was held that engineer officers of the United States Army are not troops of the United States when they are assigned to duty in connection with the improvement of rivers and harbors, or the work of the California Debris Commission, and that the Government was not entitled to land-grant deductions upon their transportation.

The terms of the obligation were "sensibly and fairly read according to the words employed and not expanded or restricted by construction" in *United States v. Union Pacific R.R. Co.*, 249 U.S. 354, 63 L. Ed. 643, when it was held (p. 360):

"The furloughed soldier is, of course, a part of the Army or troops of the United States; but his transportation back to the proper station is not 'transportation of troops' within the meaning of the land-grant acts."

Thus in construing contracts of this character the "terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction." Such contracts are not to be construed so as to give the Government more rights than those for which it has stipulated. Furthermore, it is not the function of the courts to revise a contract which the Government draws on the ground that a more prudent one might have been made, or to supply omissions which

are assumed to exist. In other words, it is the function of the courts, in construing contracts of this character, to ascertain and give effect to the intention of the parties as in the case of contracts between private parties.

It is clear, therefore, that the motor benzol in this case was neither "property of the United States," nor "military or naval property of the United States," nor "military or naval property of the United States moving for military or naval use" within the language of Section 321(a), unless the term "United States" as used in Section 321 was intended by the parties to include corporate instrumentalities of the United States such as Defense Supplies.

In the case of these contracts made in pursuance of Section 321, as in the case of contracts between individuals, the intention of the parties must be sought in the language used. There is nothing in the language of Section 321 to indicate that the parties intended that the term "United States" should include its corporate instrumentalities such as Defense Supplies.

Section 322 (Act of September 18, 1940, c. 722, 54 Stat. 955; 49 U.S.C.A., Sec. 66 in 1945 Cumulative Pocket Part), enacted as a part of Title III, Part II, of the Transportation Act of 1940, on the contrary, indicates that it was not the intention to include such corporate instrumentalities in the term "United States." Section 322 provides:

"Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presen-

tation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

Thus Section 322 requires payment for transportation of property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act "prior to audit or settlement by the General Accounting Office." The "payment" required by Section 322 can have reference only to "payment" for transportation of the property of the United States and not for the transportation of property of corporate instrumentalities of the United States such as Defense Supplies. At all times material to this action the accounts of Defense Supplies were neither audited nor settled by the General Accounting Office (Tr. 33). Furthermore, Section 322 specifically reserves to the United States Government the right "to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." This right is reserved only to the United States Government. Defense Supplies and like corporations are instrumentalities of the United States Government but they are not the United States Government nor any part thereof.

Thus there is nothing in the contracts made by the United States and the carriers by railroad in conformity with Section 321 to indicate an intention on the part of the parties that the term "United States" as used in Section 321 included corporate instrumentalities of the United States such as Defense Supplies. On the contrary,

when the provisions of Section 321 are read in connection with those of Section 322 it is clear that it was not the intention of the parties that the term "United States" should include such corporate instrumentalities as Defense Supplies.

Furthermore, at the time of the enactment of the Transportation Act of 1940, the term "United States" did not include such corporate instrumentalities. Under the decisions such instrumentalities were held to be entities separate and distinct from the United States and from its departments or boards. Such corporations, though instrumentalities of the United States, were held to be akin to private corporations governed by their charters and the general law. These cases have been referred to *supra*, pages 30-35, but for convenience, brief reference will again be made to some of them.

Thus, in *United States v. Strang*, *supra*, the Court, referring to the Emergency Fleet Corporation, held (p. 493):

"Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity."

In *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.*, *supra*, with reference to a claim in bankruptcy for priority made by the Fleet Corporation in its own name as an instrumentality of the Government, the Court held (p. 570):

"It was denied successively by the referee, the District Court and the Circuit Court of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Cor-

poration stood like other creditors and was not to be preferred. 274 Fed. 893. The considerations that have been stated apply even more obviously to this case. The order is affirmed.”

In *Skinner & Eddy Corp. v. McCarl*, *supra*, the Court, referring to the Emergency Fleet Corporation, held (p. 11):

“For the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards;”

In *Lindgren v. U. S. Shipping Board Merchant Fleet Corp.* (C.C.A. 4), 55 F. (2d) 117, certiorari denied 286 U.S. 542, 76 L. Ed. 1280, the Court, referring to the Fleet Corporation, held (p. 12):

“Although the United States owns its stock, it is a distinct entity just as other corporations are distinct from their stockholders.”

In *Continental Bank v. Rock Island Ry.*, *supra*, the Court held, in respect of Reconstruction Finance Corporation, which created Defense Supplies pursuant to authority given by Congress (p. 684):

“The Reconstruction Finance Corporation Act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is none the less a corporation, limited by its charter and by the general law.”

It is clear from the decisions that at the time of the enactment of the Transportation Act of 1940 such corporate instrumentalities as Defense Supplies were corporate entities separate and distinct from the United

States and from its departments or boards and that the United States, as owner of the stock of Reconstruction Finance Corporation, which in turn owned the stock of Defense Supplies, was not the owner of the property of Defense Supplies. In line with the cases cited Congress has shown in other enactments that it regarded such corporate instrumentalities of the United States as entities separate and distinct from the United States and that the United States was not the owner of the property of such corporations. Thus, 46 U.S.C.A., Sec. 741 (Section 1 of the Act of March 9, 1920, c. 95, 41 Stat. 525) provides:

“No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein, made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possession: Provided, That this chapter shall not apply to the Panama Railroad Company.”

Section 2 of the War Department Civil Appropriation Act, 1941, approved June 24, 1940 (54 Stat. 505, 511), provides:

“No part of any appropriation contained in this act shall be used directly or indirectly after May 1, 1941, except for temporary employment in case of emergency, for the payment of any civilian for services rendered by him on the Canal Zone while occupying a skilled, technical, clerical, administrative, executive, or supervisory position unless such a person is

a citizen of the United States of America or of the Republic of Panama: *Provided, however, . . .*”

and there follows six numbered provisions, the sixth of which is as follows:

“(6) this entire section shall apply only to persons *employed* in skilled, technical, clerical, administrative, executive, or supervisory positions on the Canal Zone *directly or indirectly by any branch of the United States Government or by any corporation or company whose stock is owned wholly or in part by the United States Government: Provided further*, that the President may suspend compliance with this section in time of war or national emergency if he should deem such course to be in the public interest.”

Thus Congress had indicated at the time of the passage of the Transportation Act of 1940 that the term “United States” as used by it in its enactments did not include such corporate instrumentalities of the United States as Defense Supplies; that such corporations are entities separate and distinct from the United States and from its departments or boards, and that the property of such corporate instrumentalities is not the property of the United States. When Congress has intended that such corporate instrumentalities should be accorded the same treatment as the United States it has used specific words indicating such intent. That this indicates the intention of Congress, see *United States v. Strang, supra*, in which case the Court held (p. 493):

“Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation. *Bank of*

the United States v. Planters' Bank of Georgia, 9 Wheat. 904, 907, 908; *Bank of Kentucky v. Wister*, 2 Pet. 318; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Salas v. United States*, 234 Fed. Rep. 842. The view of Congress is further indicated by the provision in Sec. 7, Appropriation Act of October 6, 1917, c. 79, 40 Stat. 345, 384, 'Provided, That the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the purposes of this section.' Also, by the Act of October 23, 1918, c. 194, 40 Stat. 1015, which amends Sec. 35, Criminal Code, and renders it criminal to defraud or conspire to defraud a corporation in which the United States own stock."

There are other statutes, enacted prior to September 18, 1940, the date on which the Transportation Act of 1940 was approved, in which Congress recognized the distinction between the United States and its corporate instrumentalities such as Defense Supplies, and showed that it regarded such corporate instrumentalities as entities separate and distinct from the United States and from its departments or boards, and that the property of such corporate instrumentalities is not the property of the United States. Among such statutes are the following:

- Section 6 of the Appropriation Act of October 6, 1917, c. 79, 40 Stat. 345, 383;
- 18 U.S.C.A., Sec. 76 (in 1945 Cumulative Annual Pocket Part); Sec. 80 (in 1945 Cumulative Annual Pocket Part); Sec. 82 (in 1945 Cumulative Annual Pocket Part); Secs. 83, 84, and 85;
- 5 U.S.C.A., Sec. 59a(a) (in 1945 Cumulative Annual Pocket Part); Sec. 134d (in 1945 Cumulative Annual Pocket Part);

28 U.S.C.A., Sec. 870 (in 1945 Cumulative Annual Pocket Part).

For convenience of the Court the statutes above referred to are set forth in Appendix B hereto.

Thus, at the time Congress made to carriers the proposal embodied in Section 321(a), under the terms of which the carriers are entitled to the full commercial rates for the transportation of property for the United States, or on its behalf, other than "military or naval property of the United States moving for military or naval and not for civil use," the term "United States" did not include such corporate instrumentalities of the United States as Defense Supplies. Such corporations were entities separate and distinct from the United States and from its departments or boards and their property was not the property of the United States. Therefore, in the contract which resulted from the acceptance by the carriers of the proposal made by Congress, the term "United States" as used in such contract did not include Defense Supplies and the motor benzol involved in this case was neither "property of the United States" nor "military or naval property" of the United States within the meaning of that language as used in Section 321(a).

Just as Congress had, at the time of the passage of the Transportation Act of 1940 (approved September 18, 1940), which includes Section 321(a), recognized the distinction between the United States and its corporate instrumentalities such as Defense Supplies and between the property of the United States and that of its corporate instrumentalities, so Congress had recognized the

distinction between military or naval property and the materials which are necessary for the manufacture of such property. Thus, Section 6 of the Act of July 2, 1940 (54 Stat. 712), provides:

“Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. * * *”

The quoted provision also demonstrates that when Congress intends to include materials necessary for the manufacture of military or naval property it uses apt language to indicate such intention. Had Congress intended to include the materials necessary for the manufacture of military or naval property along with military or naval property in Section 321(a), and to reserve to the United States the right to make land-grant deductions from the commercial charges for the transportation of materials necessary for the manufacture of military or naval property along with military or naval property, Congress undoubtedly would have used apt language to indicate such intention.

It is clear that the motor benzol was not, at the time of its transportation, “property of the United States” and was not “military or naval property of the United States” within the meaning of that language as used

in Section 321(a). Being neither "property of the United States" nor "military or naval property of the United States" within the meaning of that language as used in Section 321(a), it was not "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of that language as used in Section 321(a).

Assuming *arguendo* that the motor benzol was property of the United States, it was not, as hereinbefore shown, under the facts of this case, military or naval property of the United States. The motor benzol was never applied to a military or naval use. In fact, it was not suitable for such use. At most it was a strategic or critical material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline and of styrene for use, in connection with still other materials, in the manufacture or production of synthetic rubber. The 100 octane aviation gasoline was suitable for military or naval use and the synthetic rubber was suitable for use in the manufacture or production of rubber products suitable for military or naval use, and the 100 octane aviation gasoline and rubber products became military or naval property of the United States only when they were acquired by the United States through its War and Navy Departments for use by the Army and Navy.

Likewise, as hereinbefore shown, the motor benzol, at the time of its transportation, was not moving for military or naval use. The stipulation of facts shows that at the time of its transportation the motor benzol was moving for storage, processing and disposition. The motor benzol was

stored, processed and sold and ultimately was used in the manufacture and production of property which was ultimately acquired by the United States through its War and Navy Departments for the use of the Army and Navy. Movement of the motor benzol for storage, processing and sale was not a movement for military or naval use though ultimately the motor benzol became a component of products suitable for military or naval use.

CONCLUSION

In conclusion we submit that:

1. The motor benzol involved in this case was not property of the United States, but of Defense Supplies, a corporate entity separate and distinct from the United States.

2. The motor benzol was not military or naval property of the United States.

3. The motor benzol was not, at the time of its transportation, moving for military or naval use, but for storage, processing and sale.

4. The motor benzol was neither "property of the United States" nor "military or naval property of the United States" and it was not "moving for military or naval use" within the meaning of that language as used in Section 321(a).

5. The motor benzol was, at the time of its transportation, only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane

aviation gasoline and of styrene for use, in connection with still other materials, in the manufacture or production of synthetic rubber.

6. The property of which the motor benzol ultimately became a constituent part was not "military or naval property of the United States" until it was purchased by the United States through its War and Navy Departments from Defense Supplies for the use of the Army and Navy.

7. Defense Supplies was not entitled to the benefit of land-grant deductions reserved only to the United States in Section 321(a) for the transportation of "military or naval property of the United States moving for military or naval and not for civil use."

8. Appellant is entitled to recover from Appellee the sum of \$23,049.51, with interest thereon.

Respectfully submitted,

C. O. AMONETTE,

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Attorneys for Appellant.

Dated at San Francisco, California,
August 7, 1946.

(APPENDIX FOLLOWS)

APPENDIX A

Section 321 of Title III, Part II, of the Transportation Act of 1940 (49 U.S.C.A., Sec. 65 in 1945 Annual Cumulative Pocket Part) provides:

“SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided, further,* That section 3709, Revised Statutes (U.S.C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad

operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though sub-section (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

APPENDIX B

Section 6 of the Appropriation Act of October 6, 1917, c. 79, 40 Stat. 345, 383, so far as here pertinent, provides:

“That section five of the Act of June twenty-second, nineteen hundred and six, prohibiting the transfer of employees from one executive department to another, shall apply with equal force and effect to the transfer of employees from the executive departments to independent establishments and vice versa and to the transfer of employees from one independent establishment to another: *Provided, That the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the purposes of this section.*”

18 U.S.C.A., Sec. 76 (in 1945 Cumulative Annual Pocket Part) provides:

“Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee *acting under the authority of the United States*, or any department, or any officer of the Government thereof, *or under the authority of any corporation owned or controlled by the United States*, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than \$1,000 or imprisoned not more than three years, or both.”

18 U.S.C.A., Sec. 80 (in 1945 Cumulative Annual Pocket Part) provides:

“Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, *to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder,* knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of *any department or agency of the United States or of any corporation in which the United States of America is a stockholder,* shall be fined not more than \$10,000 or imprisoned not more than ten years or both.”

18 U.S.C.A., Sec. 82 (in 1945 Cumulative Annual Pocket Part) provides:

“Whoever shall take and carry away or take for his use, or for the use of another, with intent to steal or purloin, or shall wilfully injure or commit any depredation against, *any property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder, or any property which has been or is*

being made, manufactured, or constructed under contract for the War or Navy Departments of the United States, shall be punished as follows: If the value of such property exceeds the sum of \$50, by a fine of not more than \$10,000 or imprisonment for not more than ten years, or both; if the value of such property does not exceed the sum of \$50, by a fine of not more than \$1,000 or by imprisonment in a jail for not more than one year, or both. Value, as used in this section, shall mean market value or cost price, either wholesale or retail, whichever shall be the greater."

18 U.S.C.A., Sec. 83, provides:

"Whoever shall enter into any agreement, combination, or conspiracy to defraud the *Government of the United States*, or any department or officer thereof, or any corporation in which the *United States of America* is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

18 U.S.C.A., Sec. 84, provides:

"Whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property used or to be used in the military or naval service, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the *United States*, or any department thereof, or any corporation in which the *United States of America* is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

18 U.S.C.A., Sec. 85, provides:

“Whoever, having charge, possession, custody or control of any money or other public property used or to be used in the military or naval service, with intent to defraud *the United States*, or any department thereof, *or any corporation in which the United States of America is a stockholder*, or wilfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.”

5 U.S.C.A., Sec. 59a(a) (in 1945 Cumulative Annual Pocket Part) provides:

“(a) After June 30, 1932, no person holding a civilian office or position, appointive or elective, *under the United States Government* or the municipal government of the District of Columbia *or under any corporation, the majority of the stock of which is owned by the United States*, shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in Title 37, at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than \$3,000; and when the retired pay amounts to or exceeds the rate of \$3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term ‘retired pay’ shall be construed to include

credits for all service that lawfully may enter into the computation thereof.”

5 U.S.C.A., Sec. 134d (in 1945 Cumulative Annual Pocket Part) provides:

“Every officer and employee of the United States and every person acting on behalf of a wholly owned corporation who makes a shipment of valuables in good faith pursuant to and substantially in accordance with the regulations prescribed under section 134 of this title shall be deemed, insofar as there may be concerned the propriety with respect to such shipment of any act or omission governed by such regulations, to be acting in faithful execution of his duties of office and in full performance of the conditions of his bond and oath of office, if any.”

28 U.S.C.A., Sec. 870 (in 1945 Cumulative Annual Pocket Part) provides:

“Whenever an appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a district court, either by the United States or by direction of any department of the Government or any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted.”

Section 7 of the Act of June 19, 1934, 48 Stat. 1109 amended Section 870 by including therein after "Government" the following: "or any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly."

No. 11,352

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY (a corporation),

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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No. 11,352

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

SOUTHERN PACIFIC COMPANY (a corporation),

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION (a corporation),

Appellee.

BRIEF FOR APPELLEE.

SUMMARY OF CASE.

This action, to recover an additional amount (Tr. 10) of \$23,049.51 in freight charges for transporting 944,032 gallons (Tr. 44) of motor benzol, is brought under Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954; 49 U.S.C.A. 65, 1945 Cumulative Annual Pocket Part) and under the Act of Congress of June 7, 1924 (43 Stat. 486; 10 U.S.C.A. 1375). The motor benzol was transported at the instance of Defense Supplies Corporation from itself (Tr. 43) as consignor from Seattle, Washington,

Note: Throughout emphasis ours, unless otherwise noted.

to itself as consignee to Los Angeles, California (or to Vernon, California, which is within the tariff switching limits of Los Angeles) (Tr. 41). Appellant as the delivering carrier, charged with the duty of collection, presented (Tr. 44) bills for said transportation in the sum of \$56,736.14, computed upon "the full commercial rates", on tariffs duly published and filed and applicable "for the public at large". Defense Supplies Corporation paid for said transportation (Tr. 44) the sum of \$33,686.63, computed under land-grant deductions and mileage. Thus the disputed sum of \$23,049.51 is the amount of the deducted land-grant allowances. The question here presented is whether Defense Supplies Corporation was entitled to land-grant deductions in the transportation of the motor benzol, under paragraph (a) of Section 321 of the Transportation Act of 1940, which provides in substance that "the full applicable commercial rates shall be paid for transportation", *"except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use"*.

The transportation of the motor benzol was on government bills of lading, and every bill of lading was marked "*For Military Use*" (Tr. 43).

The lines of appellant, Southern Pacific Company, over which the motor benzol was transported (Tr. 210) were constructed with the aid of grants of land from the United States. The portions of the lines of the other carriers by railroad over which the motor benzol was transported, were either similarly

constructed with the aid of grants of land from the United States, or with respect to such portions of the lines not so constructed with such aid, such carriers had previously entered into "equalization agreements" with the United States, whereby the net charges to the United States for transportation over such lines were equalized with the transportation charges applicable to transportation over lines constructed with the aid of such grants of land (Tr. 45). Prior to the times of the transportation of the motor benzol, appellant and the other participating carriers by railroad, had duly filed (Tr. 46) with the Secretary of the Interior of the United States certain releases required by paragraph (b) of Section 321 of the Transportation Act of 1940. Thus, appellant and the other participating carriers by railroad had fully qualified under the requirements of paragraph (b) of said Section 321, not only to receive the benefits provided for full applicable commercial rates under paragraph (a) of said Section 321, but also by the same token to bear the burdens of land-grant deductions imposed by the identical paragraph (a) in respect of the transportation of military or naval property of the United States moving for military or naval use.

The original defendant (Tr. 32), Defense Supplies Corporation (hereinafter called Defense Supplies) was during all of the pertinent times and prior to July 1, 1945, a corporate instrumentality of the United States, duly created on August 29, 1940 on approval of the President, *to aid the Government of the United States in the national defense* (Tr. 53),

pursuant to the authority contained in Section 5d(3) of the Reconstruction Finance Corporation Act as amended (15 U.S.C.A., Sec. 606b(3), enacted June 25, 1940). Under the expressed words of the Act of its creation, which are reiterated in its charter as amended (Tr. 53), Defense Supplies was organized specifically to deal in strategic and critical materials as defined by the President and in all materials necessary in and for the *manufacture of any materials and supplies necessary to the national defense*. Its charter as amended expressly provides that Defense Supplies: "take such other actions as the President and the Federal Loan Administrator may deem *necessary to expedite the national defense program*", and "shall be an instrumentality of the United States Government" (with free use of the mails) "and in all other respects possessed of the privileges and immunities that are conferred upon the Reconstruction Finance Corporation", by law.

Rubber Reserve Company, hereinafter mentioned and called Rubber Reserve, on June 28, 1940, was similarly and under the same Act, duly created a corporate instrumentality of the United States *to aid the Government of the United States in the national defense*, with like charter powers (Tr. 92) and with objects and purposes especially devoted to dealing in, *producing, processing and manufacturing* rubber as well as related materials and substances.

On April 2, 1942, *the War Production Board* in writing (Tr. 35) recommended that Defense Supplies

purchase (as a commencement) 50,000,000 gallons of motor benzol for essential use in the synthetic rubber program *for manufacture of styrene*, and also for essential use as an *addition* to 100 octane gasoline either as benzol or as *a derivative of benzol*. On April 7, 1942, Defense Supplies adopted (Tr. 33) resolutions, soon amended, to purchase 50,000,000 gallons of motor benzol, and to enter into such agreements and arrangements as may be necessary for the *purchase, transportation, processing, sale and disposition* of the motor benzol and *by-products resulting therefrom* (Tr. 34). Pursuant to *allocations by the War Production Board* (Tr. 42) the motor benzol involved in the asserted freight charges was purchased by Defense Supplies from Seattle Gas Company, at Seattle, Washington. On arrival at destination, the motor benzol was first stored by Defense Supplies under written contract with Wilshire Oil Company (Tr. 68) at its Vernon Tank Farm.

Cumene and ethyl benzene (Tr. 51) are components in the manufacture of 100 octane aviation gasoline, and styrene is a component (Tr. 50) in the manufacture of synthetic rubber. However, untreated motor benzol is not suitable (Tr. 46) for use in the manufacture of cumene, ethyl benzene or styrene until it is first processed into industrial pure benzol.

In October, 1943 (Tr. 46), Defense Supplies entered a written contract with Shell Oil Company, whereby Shell processed the 944,032 gallons of untreated motor benzol at Shell's Wilmington Refinery

near Watson, so as to produce therefrom (Tr. 47) industrial pure benzol. Under allocations of the *War Production Board* and recommendations of *Petroleum Administration for War* and the *Office of Rubber Director* (Tr. 48), Defense Supplies in November and December, 1943, entered written contracts with Wilshire Oil Company, Richfield Oil Corporation and Rubber Reserve, whereby Defense Supplies sold all the industrial pure benzol so produced by Shell (Tr. 48): 40.56% thereof to Wilshire and Richfield *all* for use in the *manufacture of cumene* for use only by or as directed *by the United States Government* (Tr. 86 and 88); and the balance (59.44%) thereof to Rubber Reserve *all* for use in the *manufacture of styrene* for use only by or as directed *by the United States Government*.

The 59.44% of the industrial pure benzol purchased by Rubber Reserve, was first used (Tr. 49) to make ethyl benzene. The ethyl benzene manufactured by Rubber Reserve from 23.06% of the industrial pure benzol (Tr. 50) was used by Rubber Reserve in manufacturing styrene, which under *allocations* (Tr. 50) *by the Office of Rubber Director* was sold to rubber companies for use in making synthetic rubber. Said rubber companies either used this synthetic rubber to manufacture rubber products or sold it to other companies for the manufacture of rubber products. 42% of the rubber products so manufactured was sold directly to Army and Navy for their uses, and 58% thereof was sold for civilian uses, *only under allocations by War Production Board*. Thus, 9.66% of the

original motor benzol was used in the production of rubber products for Army and Navy in and for war, and 13.4% thereof was used in the production of rubber products for civilian uses, allocated by *War Production Board*.

The ethyl benzene made by Rubber Reserve from the remaining 36.38% of the industrial pure benzol was sold (Tr. 155) by Rubber Reserve under written contracts by the direction of *Petroleum Administration for War* (Tr. 50) to refineries engaged in producing 100% octane aviation gasoline for sale under written contracts to Defense Supplies. From December 2, 1942, the manufacture, use and disposition of ethyl benzene and cumene were under the direct control and administration of the *Petroleum Administration for War* (Tr. 51). Under said Administration, the cumene made by both Wilshire and Richfield from the industrial pure benzol sold to them by Defense Supplies (Tr. 51) was used by them to make 100 octane aviation gasoline, which was sold by them to Defense Supplies under written contracts. All the 100 octane aviation gasoline so purchased from said refineries and from Wilshire and Richfield by Defense Supplies was sold by Defense Supplies to Army and Navy under written contracts (Tr. 52) executed by the *War Department, the Navy Department, Petroleum Administration for War* and Defense Supplies. Thus, 76.94% of the industrial pure benzol produced from the 944,032 gallons of motor benzol was channeled to Army and Navy in the form of 100 octane aviation gasoline, or a total of 86.6% of the benzol to Army and Navy, in and for war.

Reconstruction Finance Corporation, a corporation (hereinafter called R.F.C.), was substituted as defendant herein in the place of Defense Supplies (Tr. 197). Under Senate Joint Resolution 65 (Public Law 109-79th Congress, c. 215, 1st Session), approved June 30, 1945, Defense Supplies was dissolved as of July 1, 1945, and all its functions, powers, duties and authority, together with all its documents, books of account, records, assets and liabilities of every kind and nature were transferred to R.F.C. to be performed, exercised and administered in the same manner and to the same extent and effect as if originally vested in R.F.C. (Tr. 195).

The aforesaid summary presents the ultimate facts found below on the stipulated evidence, and the evidentiary facts will be detailed in our argument.

ARGUMENT.

PART I.

THE TRANSPORTATION ACT OF 1940. ITS HISTORY AND CONSTRUCTION.

Paragraphs (a) and (b) of Section 321 of the Transportation Act of 1940 (set forth in Appendix A) were enacted on September 18, 1940.

The history of land-grant tariff deductions is well condensed in *Powell v. United States* (1945), 60 F. Supp. 433 at 435-436. Prior to September 18, 1940, the United States was entitled to land-grant deductions upon the transportation of *all* its property moving

over railroads which received land grants from the United States and over other railroads signing "equalization agreements" to meet the land-grant railroad rates. (*Lake Superior & M. R. Co. v. United States*, 93 U. S. 442, 23 L. Ed. 965; *Atchison T. & S. F. R. R. Co. v. United States*, 15 Ct. Cl. 126; *Powell v. United States*, 60 F. Supp. 433; *United States v. Galveston Ry. Co.*, 279 U. S. 401, 73 L. Ed. 760.)

In 1924, by the *Act of June 7, 1924*, Chap. 291, Title I, 43 Stat. 486, 10 U.S.C.A. sec. 1375 (set forth in Appendix B), Congress vested authority in the Secretary of War to fix such rates for the transportation of *all* property of the United States over land-grant roads as he deemed just and reasonable, but not exceeding fifty (50%) per cent of the full amount of compensation for like transportation performed "for the public at large." Then came the *Transportation Act of 1940*. The effect of paragraph (a) of Section 321 of the Act of 1940 is to yield the right of the United States to land-grant deductions in the transportation of *all* of its property and to limit such right to "the transportation of military or naval property of the United States moving for military or naval and not for civil use".

Specifically, we now have a very recent decision, dated July 8, 1946 from the Circuit Court of Appeals, Seventh Circuit, in the case of *Northern Pacific Railway Company v. The United States of America*,
 -----, which holds:

"Prior to the passage of the Transportation Act of 1940 *all* property owned by the United

States moved over land grant routes at land grant rates. From time to time, Congress has passed legislation relieving the railroads of the obligation to give to the Government certain preferential treatment in rates. The Transportation Act of 1940 carried this legislative tendency further.

* * * * *

We must remember that *all* Government property moving over land grant railroads moved at the reduced land grant rates, before Section 321 (a) was introduced. As originally drawn, Section 321 (a) would have made all Government property moving over land grant railways move at the regular commercial rates as paid on non-land grant railways. In the Interstate Commerce Committee of the Senate, an exception was inserted which retained the reduced land grant rates on 'military or naval property of the United States moving for military or naval and not for civil use'.

* * * * *

This exception was written for the benefit, not of the railroads, but of the United States, and will be liberally construed to carry out the intention of Congress."

More of this so applicable case, hereinafter.

In the construction of a Land Grant Act, it was said in *United States v. Galveston etc. Ry. Co.*, 279 U. S. 401, 73 L. Ed. 760, "the terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction". And in that very case the Supreme Court also stated:

“The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a *continuing one*. It is of great value to the Government and of course correspondingly burdensome to the carriers.”

Thus, another related rule of construction applies. A right “of great value to the Government” was yielded under the Act of 1940 in the relinquishment of the “continuing right” to land-grant deductions in the transportation of *all* property of the United States. A cardinal rule for the construction of such legislation in derogation of the public right and interest, is stated in *Slidell v. Grandjean* (1883), 111 U. S. 412, 437, 28 L. Ed. 321, 329:

“It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, *or the relinquishment of a public interest*, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual.”

It is well established that in legislative grants to railroads, rights claimed against the Government must be so clearly defined that there can be no question of the purpose of Congress to confer them; and Courts in construing such a statute may with propriety recur to the history of the times when it was passed. *Leavenworth, Lawrence & Galveston R. R. Co. v. United States*, 92 U.S. 733, 740, 23 L. Ed. 635; *Southern Pacific Co. v. United States*, 307 U.S. 393, 401, 83 L. Ed.

1363, 1369; *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 86 L. Ed. 836.

It is true that under the provisions of paragraph (b) of Section 321 of the Act of 1940, land-grant and equalization-agreement railroads did not become entitled to the benefits yielded by paragraph (a) of Section 321 of the Act, unless they had filed with the Secretary of the Interior releases of claims against the United States to certain lands. Nevertheless, and in respect of such releases, said paragraph (b) further provides that:

“Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it”.

Under the language of the Act itself, the releases to be given by the railroads related only to unpatented or uncertified lands, while the United States yielded the “continuing right” “of great value to the Government” to have *all* its property transported under land-grant deductions.

PART II.

THE MOTOR BENZOL, NAKED LEGAL TITLE TO WHICH AT THE TIME OF ITS TRANSPORTATION WAS IN THE NAME OF A CORPORATE INSTRUMENTALITY OF THE UNITED STATES, SUCH AS DEFENSE SUPPLIES CORPORATION, WAS "PROPERTY OF THE UNITED STATES" WITHIN THE MEANING OF PARAGRAPH (a) OF SECTION 321 OF THE TRANSPORTATION ACT OF 1940, AND THE UNITED STATES WAS THE REAL AND BENEFICIAL OWNER THEREOF.

The war-born status of the original defendant, Defense Supplies, is clear. It was (Tr. 32) during all the times herein involved and prior to July 1, 1945, a corporate instrumentality of the United States, duly created on August 29, 1940 by R.F.C. at the request of the Federal Loan Administrator with the approval of the President, pursuant to the authority contained in Section 5d (3) of the Reconstruction Finance Corporation Act, as amended (15 U.S.C.A., sec. 606b (3), amended June 25, 1940), (set forth in Appendix C), with its principal office located in the City of Washington, District of Columbia, and with an agent and representative in the City and County of San Francisco, in the Northern District of California (Tr. 32). Under the specific words of the Act of its creation, Defense Supplies was organized "to produce, acquire, carry, sell or otherwise deal in strategic and critical materials as defined by the President," and "to purchase and *produce* materials and supplies for the *manufacture* of strategic and critical materials and any other supplies *necessary to the national defense*, and such other supplies and materials as may be required in the *manufacture* or use of any of the foregoing, or otherwise necessary in connection therewith." As the name Defense Supplies implies, so also

its charter, as amended (Tr. 53), recites that Defense Supplies Corporation is created to *aid the Government of the United States in its national-defense program*, and sets forth its objects, purposes and powers in substantially the same language that such objects, purposes and powers are set forth in the Act of Congress pursuant to which it was created. The total authorized capital stock (Tr. 56) of Defense Supplies was \$5,000,000. The stock was of one class, with a par value of \$100 per share, issued for cash only, and R.F.C. subscribed for all of the capital stock of Defense Supplies, and said stock was not transferable. The affairs and business of Defense Supplies were managed by a board of directors appointed by R.F.C. The authorized and issued capital stock of R.F.C. is wholly owned by the United States. R.F.C. was created with capital stock of \$500,000,000 subscribed by the United States of America, subject to call in whole or in part by its board of directors, appointed by the President by and with the advice and consent of the Senate (15 U.S.C.A. 602-603).

We have heretofore shown that the construction of paragraph (a) of Section 321 of the Act of 1940 must be strictly in favor of the Government in its derogation of public right and interest. The section itself nowhere contains language designed to exclude property standing in the name of a corporate instrumentality of the United States from the term "property of the United States". Appellant seeks to draw some inference regarding the intention of Congress from the fact that Section 322 of the Act of 1940, with respect to the right of the United States to deduct past

overpayments from sums later found due to the carriers, uses the term "United States Government". It would seem better to seek direct comparison in the very text of the same paragraph (a) of Section 321. This paragraph itself expressly includes, in the same exception from full commercial rates, not only "the transportation of members of the military or naval forces of the United States", but even the transportation of "*property* of such members, when such members are traveling on official duty". It does not seem logical to assert that Congress in the same provision, which yielded to the carriers a right "of great value to the Government", intended to include in the exception from full commercial rates the *property owned absolutely and personally by individuals* of the military or naval forces, and to exclude from such exception property of which the United States is the real and beneficial owner.

It cannot be doubted that two of the essential in-herents of the ownership of property are, the right of the owner to sue for or in respect of his property, and the burden of the owner in bearing taxes lawfully levied thereon. In holding not only that the United States may sue for or in respect of property standing in the name of its corporate instrumentality, but also in holding that state and local taxing officials may not lawfully levy taxes upon property standing in the name of a corporate instrumentality of the United States, the Courts, *both before and since* the enactment of the Transportation Act of 1940, have uniformly decided such issues upon the ground that such property is in fact the property of the United States.

In the light of our decisions, firmly establishing the proposition that property standing in the name of a corporate instrumentality of the United States is in fact the property of the United States, it must be held that the motor benzol involved in this case, title to which at the time of its transportation stood in the name of Defense Supplies, a corporate instrumentality of the United States, was "property of the United States" within the meaning of paragraph (a) of Section 321 of the Transportation Act of 1940.

In *Defense Supplies Corporation v. United States Lines Co., et al.* (D.C.N.Y. 1944), 57 F. Supp. 291, it was held that a cargo of wool shipped from Australia and consigned to Defense Supplies was in fact property of the United States though title thereto stood in the name of Defense Supplies. The Court pointed out that the wool was intended solely for the Government's emergency stock pile, the creation of which was distinctly a war measure. The Court said:

"The wool, all technical questions of title aside, was in reality the property of the United States, and was to be used for the benefit of the Government, at such times and manner as the appropriate official might decide upon. That this must be so seems abundantly clear from the decision of the Supreme Court in *Inland Waterways Corporation v. Young*, 309 U.S. 517, 524, where funds of a non-public character, and nominally owned by a governmental agency, were held, from a practical standpoint, to be those of the United States. * * * *The only reason for its* (Defense Supplies) *existence* was that the Government, through its corporate form, might more readily

and easily than would otherwise be possible, engage in activities designed and intended to be *part and parcel of the war effort.*”

This case was affirmed by the Circuit Court of Appeals, Second Circuit (1945), 148 F. (2d) 311, stating that Defense Supplies was *completely owned by the United States.*

In the mentioned Supreme Court decision in *Inland Waterways Corporation v. Young*, 84 L. Ed. at 906, it was held:

“The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits * * * The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive (citing cases). The funds of these corporations are for all practical purposes, Government funds; the losses, if losses there be, are the Government’s losses (citing cases and Annual Reports of U. S. Shipping Board, of Merchant Fleet Corporation, and of Inland Waterways Corporation).”

This Circuit Court of Appeals, Ninth Circuit, in *King County (Wash.), et al. v. United States Shipping Board Emergency Fleet Corporation* (1922), 282 Fed. 950, where officials of plaintiff county sought to tax property held by defendant corporation, which was organized, with all of the stock thereof owned, by the United States, the Court in holding that the property of the corporate instrumentality belonged

to the United States and was therefore not subject to plaintiff's taxing power, stated (p. 953):

"But here, admittedly, the property is not only held by a governmental agency, but was acquired with public funds, and was to be used for public purposes. To hold that it lost its public character because the Government chose to have the legal title taken in the name of a corporation which it brought into existence and completely controls for its own convenience, and the entire capital stock of which it owns, would be to sacrifice substance to form * * * Clearly * * * in the purchase of property for Government purposes, and in taking and holding legal title thereto, the corporation was acting as a naked trustee, and the entire beneficial interest was in the Government."

Moreover, in distinguishing the *Sloan Shipyard Case* (cited in appellant's brief pp. 31, 64) this Court pointed out that:

"* * * It is not thought that the question (exemption of Fleet Corporation property from state taxes) is foreclosed by the Sloan Shipyard decision. That case had to do with the intent of Congress upon another subject, the status of the corporation; *but here we are concerned with the status of the property and the intention of Congress in respect thereto* * * *"

In *Callam County (Wash.), et al. v. United States and United States Spruce Production Corporation* (1923), 263 U. S. 341, 68 L. Ed. 328, the tax authorities imposed a tax upon the property of Spruce Production Corporation, which had been organized as a

corporate instrumentality for carrying on the first World War, and all its property had been conveyed to it by the United States or bought with Government money. The Court, in holding the tax invalid, said at page 331 of 68 L. Ed.:

“The State claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government and invalid upon admitted grounds; but that taxation of the property of the agent is not taxation of the means. We agree that it ‘is not always, or generally, taxation of the means’ as stated by Chief Justice Chase in *Thompson v. Union Pacific Railroad*, 9 Wall. 579, 591. But it may be, and in our opinion, clearly is, when, as here, not only the agent was created but all the agent’s property was acquired and used, for the sole purpose of *producing a weapon for the war*. This is not like the case of a corporation having its own purposes as well as those of the United States, and interested in profit on its own account. The incorporation and formal erection of the new personality was only for the convenience of the United States to carry out its ends.”

In *United States Shipping Board Emergency Fleet Corporation v. Delaware County, Penn.* (C.C.A. 3) (1927), 17 F. (2d) 40, certiorari denied 278 U. S. 607, 73 L. Ed. 533, the county attempted to tax the property of the corporation which was created by the Government and whose stock was owned and whose assets were furnished by the Government. The Court decided that the property was not subject to taxation and said, at page 40 of 17 F. (2d):

“In the light of such facts, and there being no suggestion of ownership or interest elsewhere, it is clear that the real ownership of the land was and is in the United States, and that the Fleet Corporation, the holder of the title, held said title as a mere legal holder for the benefit of the United States.”

In *City of Clifton v. State Board of Tax Appeals* (1941, N. J.), 17 A. (2d) 476, the city had assessed personal property, title to which stood in the name of *Reconstruction Finance Corporation*, an instrumentality of the United States, and the appellee in the case at bar, standing in the same position as Defense Supplies, the original defendant herein. In holding that the property was exempt from taxation, the Court said at page 477:

“A single question is presented, namely, whether the property in question is the property of the United States and subject to exemption from taxation because of a lack of power in the states to tax property of the United States and its governmental agencies * * *

“When consideration is given to the purposes, organization, and operations of the corporation, it becomes apparent it was designed to be and in fact is a governmental agency of the United States and that the property held by it is property of the United States.

“In *United States v. Lewis*, D. C., 10 F. Supp. 471, 474 it was said: ‘There is no doubt whatever that all the property of the Reconstruction Finance Corporation is in reality the property of

the United States Government, and that all the activities of that corporation were just as much activities of the government as if they were conducted by the Secretary of the Treasury in his official capacity, or by some other governmental official'.

"It was further said: 'If the Act of Congress instead of creating the Reconstruction Finance Corporation, had created an executive office and provided for the appointment of a natural person to fill the same, and had invested such official with the powers conferred on the Reconstruction Finance Corporation, no one would question the proposition that such official was an agent of the United States Government, and that all the property which he held was the property of the United States; and this is none the less true because Congress had seen fit to use a corporation instead of a natural person'."

There are numerous other cases similarly holding it is unquestioned that property of corporate instrumentalities of the United States is the property of the United States. Among others, see:

New Brunswick v. United States (1928), 276 U. S. 547, 72 L. Ed. 693; *United States Spruce Production Corporation v. Lincoln County, et al.* (1922), 285 F. 388; *United States v. Coghlan* (1919), 261 F. 425; and *United States Housing Corporation v. City of Watertown* (1920), 185 N.Y.S. 309.

The line of cases holding that the United States may sue in its own name for or in respect to property standing in the name of its corporate instrumentalities

is equally unanimous in deciding that such property is in fact the property of the United States.

In *Cherry Cotton Mills Inc. v. United States* (1945, Ct. Cl.), 59 F. Supp. 122, an action was commenced by the plaintiff, Cherry Cotton Mills Inc. against the United States to recover processing and floor stock taxes paid under the unconstitutional Agricultural Adjustment Act. The United States filed a counterclaim based upon an indebtedness immediately owing by Cherry Cotton Mills to *Reconstruction Finance Corporation*. The counterclaim was filed under the provisions of Section 145 of the Judicial Code (38 U.S.C.A., Section 250 (2)):

“The Court of Claims shall have jurisdiction to hear and determine the following matters: Second. All setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or any other demands whatsoever on the part of *the Government of the United States* against any claimant against the Government in said Court
* * *

In holding that the United States Government could properly file a counterclaim on the basis of an indebtedness due to R.F.C., the Court stated:

“The R.F.C. is an agent of the Government, a device for accomplishing the Government’s purposes with the Government’s money. The text of the statute creating the R.F.C., 47 Stat. 5, 15 U.S.C.A. 601-617 makes this plain. The Government’s assets and credits stand behind the R.F.C.’s obligations, and the R.F.C.’s losses are the Government’s losses. Debts owing to the

R.F.C. are owed to it as agent and trustee for the Government. We use the word trustee since the R.F.C. does have the legal capacities of a separate legal person, to own property and to sue and be sued. But these powers and capacities are held by it in trust, for the benefit of one sole beneficiary, the Government. Looking through the trust, the assets and claims held by the R.F.C. are in substance and in equity, assets and claims of the Government which are kept, for convenience, in a different receptacle from the one in which the Government keeps most of its money, viz., the Treasury.

“In the case of *Crane, et al., Receivers, v. United States*, 55 F. (2d) 734, 73 Ct. Cl. 677, certiorari denied 287 U. S. 601, 53 S. Ct. 7, 77 L. Ed. 523, this Court allowed the United States to recover a judgment on a counterclaim against a plaintiff who sued for the refund of taxes, and who had given a bond to the United States Shipping Board Emergency Fleet Corporation. It held that whether or not the Fleet Corporation was *an entity separate from the United States was immaterial.*”

Further the Court, in distinguishing the case of *R.F.C. v. J. G. Menihan Corp.* (cited in appellant's brief, pp. 35, 38, 42), stated as follows:

“Cases holding that R.F.C. is liable to costs, as other litigants are, *R.F.C. v. J. G. Menihan Corp.*, 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595, or that the Federal Housing Administration is subject to garnishment under the state law for wages due to an employee, *Federal Housing Administration v. Burr*, 309 U. S. 242, 60 S. Ct. 488,

84 L. Ed. 724, are not of significance in the solution of our problem. The Supreme Court in those cases was only deciding what Congress meant when it endowed Government corporations with the capacity to sue and be sued. It held that Congress intended that they could be sued like private persons, and that sovereign immunity from suit was waived. *But no Court has decided that Congress has shown any intention that the United States must pay out money to one who is indebted to it, through its agent and trustee, in a greater amount on a debt past due. That would not be a waiver of sovereign immunity, but a subjection of the sovereign's finances to risks and inconveniences to which no private person is by law subjected.*"

Finally, the Court clearly pointed out the immateriality to the issues involved in the case of the manner in which the United States has chosen to have its own financial transactions and those of its agents audited, stating as follows:

"We do not regard as material the part which the General Accounting Office played in the transaction here in question. We think it was the duty of someone, on behalf of the Government to see that this set-off was made. Whether the statute defining the functions of the Comptroller General lodged that duty there, or not, is a matter which would seem to be no concern of the plaintiff. How the Government inside its own organization, took care that its right of set-off should not be overlooked, in its multiplicity of transactions, is not material".

Other cases applicable include *Erickson v. United States* (1924), 264 U.S. 246, 68 L. Ed. 661; *Reconstruction Finance Corporation v. Krauss, et al.* (D.C. N.J. 1935), 12 F. Supp. 44; *United States, et al., v. Arthur, et al.* (D.C.S.D. N.Y., 1937), 23 F. Supp. 537; *United States v. Freeman* (D.C. Mass. 1937), 21 F. Supp. 593; and *United States v. Skinner & Eddy Corporation* (D.C. Wash.), 28 F. (2d) 373.

The principle and reasoning of all of the foregoing cases apply to the property, the motor benzol, standing in the name of Defense Supplies, which was created pursuant to an Act of Congress to aid the Government of the United States in the national defense, with its statutory and charter purposes to carry out governmental functions of the United States for and in war, financed by the United States and wholly controlled by the United States, with its non-transferable stock wholly owned by R. F. C., whose stock was wholly subscribed and owned by the United States.

By reason of the authorities aforesaid and the record facts heretofore recited and to be hereinafter developed, it must be concluded that the motor benzol was at the time of its transportation "property of the United States" within the meaning of paragraph (a) of Section 321 of the Transportation Act of 1940.

Appellant repeatedly reiterates, that there is a distinction or separateness between its corporate instrumentality Defense Supplies and the United States itself. We answer with: (1) this Circuit Court of

Appeals, Ninth Circuit (*King County v. U. S. Shipping Board* (supra), 282 F. 950), that the status of the corporate entity is another subject, “*but here we are dealing with the status of the property*”; and (2) the case of *Crane, et al., Receivers, v. United States*, 55 F. (2d) 734, 73 Ct. Cl. 677, certiorari denied 287 U. S. 601, 53 S. Ct. 7, 77 L. Ed. 523, to the effect that whether or not a corporate instrumentality (Fleet Corporation), is an entity separate from its principal the United States is immaterial. We observe there also is a distinction between its every duly constituted officer, a natural person whether elective or appointive, and the United States. We conclude, by remarking that our answer is both ancient and recent. Of old, in *M’Culloch v. Maryland*, 17 U.S. 315, 4 L. Ed. 579, Chief Justice Marshall stated that in carrying out its enumerated powers, the Federal Government has power to create and use such agencies as it sees fit, such as creating a corporate instrumentality (a bank) and that the power of creating such a corporation is never used for its own sake but for the purpose of effecting something else; that the power to create includes the power to preserve; and that the states by taxing such agencies could destroy the same or nullify the powers granted to the Federal Government. In newer days, Justice Jackson, in the same vein but in other terms and speaking of the same subject of taxing property standing in the name of a corporate instrumentality of the United States, said in *United States v. County of Allegheny* (1944), 322 U.S. 174-198, 88 L. Ed. at 1219:

“The ‘Government’ is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in some one who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor * * * But neither he nor the Government can be taxed for the Government’s property interest.”

PART III.

THE MOTOR BENZOL, AT THE TIME OF ITS TRANSPORTATION, WAS “MILITARY OR NAVAL” PROPERTY OF THE UNITED STATES AND WAS “MOVING FOR MILITARY OR NAVAL AND NOT FOR CIVIL USE”, WITHIN THE MEANING OF SECTION 321 (a) OF THE TRANSPORTATION ACT OF 1940.

At once, under this caption, appellee again recurs to the so recent and applicable decision in *Northern Pacific Railway Company v. The United States of America* (C.C.A. 7), (), wherein the sole question directly presented was whether each of five shipments of property was a shipment of “*military or naval property moving for military or naval, and not for civil use*”. The property in each shipment was: (1) *Copper cable*, to be used on a hull being built by Seattle-Tacoma Shipbuilding Corporation under a contract with the Maritime Commission, and the hull on delivery was operated as directed by the Maritime Commission or the War Shipping Administration; (2) *Lumber*, for the construction of an ordnance plant for the manufac-

ture of ammunition under a cost-plus-fixed-fee construction and operation contract by the War Department with Federal Cartridge Corporation, and with Foley Brothers and Wallbridge Adinger Company, sub-contractors, for construction; (3) *Fir Lumber*, shipped to be urea salts treated, kiln-dried, milled, and manufactured into trestle barks and pontoon barks, sills and chess, at Crown Iron Works, pursuant to contract with the corporation; (4) *Bowling alleys*, procured on a contractor's purchase order and installed at Dutch Harbor in a building, intended for a recreation center for the contractor's men and later as a recreation center for the military personnel at the station; (5) *Liquid paving asphalt*, for use in constructing runways at an airport, under a program entitled "Development of Landing Areas for National Defense", conducted by the Civil Aeronautics Administration. The Court held:

"At the time of the enactment of the Transportation Act of 1940 it was obvious that the general needs of security demanded a greatly expanded Army and Navy. Such enlarged military and naval forces would demand supplies and equipment far in excess of the then existing reserves. With the war spreading throughout Europe in 1940 and with the knowledge of the meager and inadequate military strength of the United States, *it is most unrealistic to presume that Congress intended any restrictive meaning of 'military and naval property' as used in the Transportation Act of that crucial year. To define 'military and naval property' in any narrow sense would be to close one's eyes to the com-*

plexities and realities of modern war. We will not impute to Congress such lack of vision”.

“* * * The use to which the property was to be put was the controlling thing. If the property was to be used for military or naval purposes as distinguished from a civilian use, the property was military and naval property within the meaning of the Act. *We look to the use to which the property was to be put to determine its character for rate paying purposes.*

“When this Act was passed, Congress was engaged in strengthening our defense. War was imminent. Congress intended to save from the release of applicable land grant rates whatever of Government property was shipped over land grant railways to be used by the United States in its military and naval security program. * * * All property used for military or naval purposes was excepted from the whole category of Government-owned properties that had theretofore enjoyed the low rates prevailing on land grant railways, and for these excepted properties the low rates were to continue. That the properties transported here in question were used for military or naval purposes is apparent from a reading of the descriptions of the use to which they were put by the United States. *Congress acted while total war raged in Europe and in contemplation of our situation if total war should come to us, which it did.* * * * Any property the Government used to forward its total war effort was military or naval property, and if owned by the Government and transported over land grant railways, it was a kind of property Congress did not release

from the low rates granted by the land grant railways''.

It was to the same grave realities that Congress had just responded with another statute here involved. It was on June 25, 1940, that Section 5d(3) of the Reconstruction Finance Corporation Act (Appendix C) was enacted, and World War II was ablaze in Europe. On that date Congress authorized the use of corporate instrumentalities "*to aid the Government of the United States in its National Defense Program*". With our entry into war fearfully impending, on August 29, 1940, the United States on approval of the President had recourse to said Section 5d(3) of the R.F.C. Act, and thus was Defense Supplies war-born.

The words of Section 5d(3) were carried into the charter of Defense Supplies (Tr. 53) there to be a foreboding of the events to come, so soon. Statute and charter are a forecast of the fact that the actions thereby contemplated would be so vitally necessary. The charter's words (Tr. 53) last amended on July 9, 1941: "*to purchase and produce * * * materials and supplies for the manufacture of strategic and critical materials * * * of war, and any other * * * supplies necessary to the national defense, and such other * * * materials as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection therewith*", seem prophetic of: April 1942, with its Reid-War Production Board recommendations, with the prompt resolution of De-

fense Supplies as amended, all in respect of the motor benzol for defense and war.

In December 1941, war was declared. Then and thereafter Germany was marching on, and the Japanese invasion swept on to the Philippines and into the South Pacific. These grim facts served to establish the overwhelming importance of aviation in the prosecution of a modern and global war, and the dire necessity of the President's program for an annual production of 50,000 airplanes. Similarly the loss to the Japanese of the source of 90% of the world's supply of natural rubber made synthetic rubber and the "700,000 ton rubber program" *essentials for war*.

Under date of April 2, 1942, Defense Supplies received the written (Tr. 35) recommendation of the *War Production Board* to the *Department of Commerce* for the purchase of a stock pile of 50 million gallons of motor grade benzol, and this recommendation was based on (Tr. 36) the memorandum of E. W. Reid, Chief Chemicals Allied Products Branch of the War Production Board, dated March 31, 1942. As of April, 1942, let us with Defense Supplies examine the Reid memorandum (Tr. 36), which stated among other things: "subject, stock pile of benzene (benzol)"; "future essential uses in the *synthetic* rubber program for *manufacture of styrene* * * * eventually requiring 80 to 100 million gallons per year for the 700,000 ton rubber program"; "also essential use as an *addition* to 100 octane gasoline, either as benzol or as a *derivative of benzol*; this latter use has *only recently assumed significance, but may become exten-*

sive”; * * * “since the synthetic rubber plants will be built to use impure benzol, now marketed under the term motor benzol, and since this grade constitutes two-thirds of present production, the major stock pile should be made up from the ordinary motor grade”; * * * “suggestions as to the best way to handle purchases: *purchases* should probably be made *through Defense Supplies*; the benzol will be released from this stock pile for operation of synthetic rubber plants and *perhaps also* for incorporation in 100 octane gasoline”; * * * “percentage of stock pile recommended for release to industry, *probably none*; percentage of stock pile recommended for permanent stock pile, *probably none*”; * * * “it seems evident that the essential demand for benzol in 1943 will exceed production; there is a tremendous amount of benzol (100 million gallons per year) now going into motor fuel; it is imperative that this practice be stopped at once so that *this benzol will be available for synthetic rubber and aviation gasoline*”; “we recommend that Defense Supplies purchase at least 50 million gallons of motor grade benzol as quickly as practicable *to be allocated for defense purposes* * * * and that *immediate action* is therefore imperative”. The recommendation for 50 million gallons of motor grade benzol was increased to 65 million gallons under date of June 4, 1943 (Tr. 39).

Promptly, on April 7, 1942, Defense Supplies acted in time of war to provide the United States with aviation gasoline and synthetic rubber for use in the prosecution of the war. On said date Defense Sup-

plies adopted written resolutions which originally (Tr. 33), provided in part: "to purchase * * * not to exceed fifty million gallons of motor benzol"; * * * "to make such other arrangements as may be deemed necessary * * * including but not limited to *transportation* * * * and disposition of such motor benzol." By the very amendments to these resolutions we will show, that before the first drop of the motor benzol arrived at destination on July 28, 1942 (Tr. 43), it already was the pre-determined purpose to *process* the motor benzol and to dispose of it and its *by-products*, all in accord with the activating Reid-War Production Board program for the "*manufacture of styrene*" for synthetic rubber, and essential use in 100 octane gasoline "either as benzol or a *derivative of benzol*", and "to be allocated for *defense purposes*".

Not later than February 3, 1942 (Tr. 128) and April 29, 1942 (Tr. 102) Defense Supplies entered into "supply contracts" with the right to purchase all the production of 100 octane aviation gasoline of various refineries (Tr. 49), such as it did on these dates with Richfield and Wilshire. From the execution and provisions of such "supply contracts", it is evident that the United States intended that this aviation gasoline would be channeled directly into the hands of the War and Navy Departments for the direct prosecution of the war. These supply contracts were entered into by Defense Supplies at the *request of the Army and Navy Departments* and the *Petroleum Administration for War* (Tr. 49); they provided that certificates of inspection be delivered to

authorized representatives of the *War and Navy Departments*; and officials and employees of the *War and Navy Departments* were made agents of Defense Supplies to accept delivery of the aviation gasoline. Before the first transportation of the motor benzol in July, 1942, it is definite that the motor benzol or the derivatives therefrom, which Defense Supplies might thereafter place in the hands of refineries for processing into aviation gasoline would go to the War and Navy Departments either directly or through Defense Supplies. The sequence in the record makes this program further definite and certain by the execution on December 19, 1942, of the agreement (first of three agreements) between the *War Department*, *Navy Department*, *Petroleum Administration for War* and Defense Supplies (Tr. 170). That agreement clearly provided that the supplies of gasoline which Defense Supplies would obtain under "its supply contracts" would be made available ONLY to the *War and Navy Departments* and to consumers selected by said Departments, the Petroleum Administration for War and the British Government, sitting (Tr. 172) as an "Allocations Committee", and providing a complete procedure for the handling of such aviation gasoline.

Within or without the record there are not similar definite agreements for the channeling of synthetic rubber or its components from Defense Supplies to Army and Navy, and the reason therefor is clear. Since its creation, there stood alongside Defense Supplies and at the same address (Tr. 89) another

war-born corporate instrumentality, Rubber Reserve, created (June 28, 1940) under the same section 5d(3) of the R.F.C. Act, and which was specifically devoted to the acquisition, production and disposition of rubber (Tr. 92). There can be no doubt that before the first transportation of the motor benzol in July, 1942, it was part of the war program that synthetic rubber, quite exclusively in the domain of Rubber Reserve, would be obtained by Rubber Reserve from the motor benzol and *its derivatives*. The first essential use mentioned for the motor benzol in the Reid-War Production Board recommendation on which Defense Supplies first acted, was the essential use in the synthetic rubber program for manufacture of *styrene*. As a matter of clear fact, under the Reid-War Production Board recommendation, the use of the motor benzol was secondly mentioned as "an addition" to 100 octane gasoline either as benzol or as a *derivative of benzol*; "and this latter use has *only recently* assumed significance, but may become extensive." Furthermore, the Reid-War Production Board's recommendation expressly gives the reasons for the then contemplated priority-use of the motor benzol for the manufacture of styrene for synthetic rubber: "since the synthetic rubber plants will be built to use impure benzol" and * * * "*currently* it (benzol) cannot be incorporated in large amounts in aviation gasoline because the aircraft equipment, such as leak-proof tanks has not yet been fully converted to a type which will resist action of *benzol blends*". The greater part (59.44%) of the industrial pure benzol was diverted

to Rubber Reserve, and *at first* it was to be processed into styrene (Tr. 49), but thereafter only the 23.06% thereof (Tr. 50) was so used.

While the Reid-War Production Board's recommendation of April 2, 1942, immediately begot Defense Supplies' resolution of April 7, 1942, we find the very amendments to this resolution highlighting the development and successive steps of the motor benzol program. The early amendment of July 18, 1942, changed the words "disposition of such motor benzol" to the words "*processing* and disposition of such motor benzol *and by-products resulting therefrom*" (Tr. 34). The later amendment of September 21, 1942 changed the words "purchase and place in storage" to the words "purchase, store, and arrange for *further processing and sale* of not to exceed fifty million gallons of motor benzol" (Tr. 35). These amendment-added steps "*processing* and disposition of such motor benzol and *by-products* resulting therefrom" and "*further processing* and sale" determined every step which was in fact taken by Defense Supplies in the processing and disposition of the motor benzol and its by-products. The contemplated and the actual use of the motor benzol before and from its purchase and transportation to be and become components of synthetic rubber and aviation gasoline for the prosecution of the war, proclaims not only its "military or naval" character but also its transportation "for military or naval use". In the light of this record of the pre-ordained program for the motor benzol, it cannot be said that the anticipated proces-

sing with the addition of other necessary components to make aviation gasoline and synthetic rubber, strips the motor benzol or the use for which it was moving of "military or naval" character. There was no hesitation on the part of our Supreme Court to state that a corporate agency of the United States, created in World War I as an instrumentality for carrying on the war, was acting "solely as a means to that end", when "producing a weapon for the war" by *producing and manufacturing materials* for aircraft, such as lumber. (See quotes from *Callam County v. United States and United States Spruce Production Corporation* in Part II, page 19, of appellee's argument). Likewise, there should be no hesitancy upon the part of this Court to hold the realistic view that the motor benzol was "military or naval property" transported "for military or naval use", when Defense Supplies like the Spruce Corporation was created, and then acted, to *produce and manufacture materials for war*. Let us re-examine the steps actually taken pursuant to the planned war-use of the motor benzol.

The transportation of the motor benzol via tank-cars (Tr. 41) commenced in July, 1942 and ended in December, 1943. The purchases of the motor benzol by Defense Supplies from Seattle Gas Company from time to time during the period from June, 1942 to November, 1943, were made by Defense Supplies on written orders (letters) and acceptances pursuant to written allocations by the *War Production Board* (Tr. 42). The various shipments of the motor benzol, upon arrival at destination, were stored for Defense Sup-

plies at the Vernon Tank Farm of the Wilshire Oil Company under written contract dated May 13, 1942 (Tr. 43).

Defense Supplies contracted with Shell Oil Company on October 16, 1943 to refine the motor benzol into industrial pure benzol at the Wilmington Refinery of Shell near Watson, California (Tr. 46), and the 944,032 gallons of motor benzol transported from Seattle were thus treated and re-run by Shell (Tr. 47). Under allocations of *War Production Board* and recommendations of *Petroleum Administration for War* 40.56% of said industrial pure benzol was sold by Defense Supplies to Wilshire and Richfield under written contracts dated respectively November 16, 1943 and December 3, 1943 (Tr. 48), requiring Wilshire and Richfield to use *all* said industrial pure benzol only in the manufacture of cumene, a component of aviation gasoline, *for use only by the United States Government*. So also, and under the direction of the *Office of Rubber Director*, 59.44% of said industrial pure benzol was sold by Defense Supplies under written contract to Rubber Reserve (Tr. 89) to use *all* the industrial pure benzol for styrene, a component of synthetic rubber, *for use only by the United States Government*. At the time of the above sales, Wilshire and Richfield and various other refineries were under contract to Defense Supplies for the purchase by it of *all of the 100 octane aviation gasoline produced by them* (Tr. 49), and said contracts were made by Defense Supplies pursuant to the request of the *Petroleum Administration for War*,

the *War Department* and the *Navy Department* (Tr. 49). Along with the sales of the benzol by Defense Supplies to Wilshire, Richfield and Rubber Reserve, Defense Supplies was in December, 1942, a party to a written agreement with the *War Department*, *Navy Department*, and the *Petroleum Administration for War*. As a matter of fact, there were *three* such written agreements. The first dated December 19, 1942 (Tr. 52 and 170), which was modified and extended on May 20, 1943 (Tr. 52 and 160), which in turn was modified and extended on July 1, 1944 (Tr. 52 and 180). These three contracts are in substance the same, reciting that their execution and provisions are *necessary for the effective and successful prosecution of the war* (Tr. 161 and 181) and providing for the execution by Defense Supplies of contracts for the purchase of substantially the entire available production of 100 octane aviation gasoline (Tr. 161 and 170), and also providing for the right of Army and Navy to take direct deliveries of (and title to) all the 100 octane aviation gasoline purchased by Defense Supplies, with the further war-precaution that such 100 octane aviation gasoline be made available *only* to the Army and Navy (Tr. 161 and 171), with allocations to certain other consumers made solely pursuant to the direction of the Aviation Petroleum Products Allocations Committee comprising representatives of the Army, the Navy, the Petroleum Administration for War and the British Government. *More specifically* concerning the motor benzol involved in this case, all the 100 octane aviation gasoline pro-

duced by Wilshire and Richfield (Tr. 51) from the cumene made by Wilshire and Richfield from the motor benzol, and all the 100 octane aviation gasoline produced by other refineries (Tr. 51) using the ethyl benzene manufactured by Rubber Reserve from the benzol, were sold under written contracts to Defense Supplies, which sold all the 100 octane aviation gasoline it purchased from all sources to the Army and Navy under written contract (Tr. 52). From all the foregoing stipulated facts it is indisputable that: (1) from each war-allotted purchase of the motor benzol by Defense Supplies (Tr. 42) from June, 1942, to November, 1943, each step taken was the programmed use of the motor benzol in the processing and disposition of the motor benzol and the by-products resulting therefrom, and (2) from the first purchase of the motor benzol by Defense Supplies under allocation made by the War Production Board, the motor benzol and the products made therefrom were at all times strictly under the control of the United States through its numerous and named war agencies for no other reason than the contemplated use of the motor benzol in the prosecution of the war.

The fact that 86.6% of the industrial pure benzol made from the transported 944,032 gallons of motor benzol is so directly traceable to war-use by Army and Navy is a mathematical demonstration that (1) Defense Supplies consummated the pre-arranged defense and war program of the Government, based on the

Reid-War Production Board recommendation, to purchase, transport, process, sell and dispose of the motor benzol as the "Military or Naval Property of the United States" for Army and Navy, and that (2) said property in its transportation moved "for military or naval use" for its pre-ordained conversion into 100 high octane and synthetic rubber for war-use by Army and Navy.

Even had it been within the contemplation of any of the many participating war instrumentalities, agencies, boards or departments of the United States at the time of transportation, that 13.4% of the motor benzol possibly would be used for the manufacture of the "strategic and critical material" of rubber (rubber products) for civilian purposes, under the direct *allocations of the War Production Board*, this factor is so minor that this eventual use is merely incidental to the primary military and naval use.

The words "and not for civil use" in the Act of 1940 were used by way of contrast to the words, "military or naval use". They tend to indicate that a "military or naval use" may not be based upon subsidiary or secondary military or naval aspects or considerations. Conversely, they tend to indicate that "civil use" may not be based on subsidiary or secondary civilian aspects or considerations. The courts, prior to the enactment of the Transportation Act of 1940, and the United States Government subsequent thereto, have recognized the clear-cut distinction between primary or preponderant and secondary or incidental, purposes.

Thus, in *Southern Pacific Co. v. United States* (1932), 285 U. S. 240, 76 L. Ed. 736, the Court had before it the question of whether Army Engineer officers were "troops of the United States" within the meaning of a land-grant act, when assigned in time of peace to duty in connection with the improvement of rivers and harbors in California. (California Debris Commission.) In holding that the United States was not entitled to make land-grant deductions, the Court said (76 L. Ed. 739):

"While, as is argued by the United States, river and harbor improvement have in one aspect a bearing upon the military defense of the United States, obviously the principal purpose of this work is the promotion of commerce and transportation."

Thus also, the United States Government has recognized in a time of depression and active defense that there is a distinction between military and non-military use, in terms of underlying purpose. The Emergency Relief Appropriation Act of 1941 (Pub. Res. No. 88, 76 Cong., June 26, 1940) provides for the use of funds in connection with the prosecution of projects, certified by the Secretary of War or Navy to be important for military and naval purposes. The primary aim of the Relief Act itself, however, was found to be to help the needy, by the Comptroller General. He therefore ruled that a shipment of materials, in 1941, for a project at a military camp, was not entitled to land grant deductions under the Transportation Act of 1940. (See 20 C. G. 438, 4422):

“In other words, when consideration is given to the purpose and effect of the various provisions of the Act, it would seem that the certifications thereunder as to importance for military or naval purposes properly may be regarded * * * as pertaining to the incidental consequences or the secondary nature of the projects concerned rather than as indicating the primary character of said projects or the controlling and preponderant purposes to be served by them.”

The converse of the above-stated proposition must follow—that uses primarily “military or naval” remain so notwithstanding that the use may involve some incidental or secondary civilian aspects or considerations. Appellee has established the right to land grant deductions with respect to all of the shipments of the motor benzol. Even if a court could assume that any of the participating war instrumentalities, agencies, departments and board of the United States might have envisaged at the time of the transportation of the motor benzol that so small a portion (13.4%) of the industrial pure benzol processed from the motor benzol might ultimately find its way into civilian uses under allocations of the War Production Board, nevertheless it is submitted that the “controlling and preponderant” military or naval purposes so far predominated over such an eventual minor civilian use, that the Court on the record should hold that *all* shipments of the motor benzol were moving “for military or naval use”, and were “military or naval” in character. This is particularly true in view of the fact that any civilian use of both motor

benzol and synthetic rubber was, at all times pertinent here, only the use permitted under war-time conservation orders designed strictly to limit civilian use thereof for purposes best designed to further defense and war. To illustrate, on April 20, 1942, Conservation Order No. M-137 was issued by the Director for Industry Operations of the War Production Board (7 F. R. 2944, Tr. 41). This order related to benzol, imposed restrictions upon the use and delivery of benzol, and taking effect immediately, began with the words: "the fulfillments of requirements for *the defense of the United States* has created a shortage in the supply of *benzene (benzol) for defense*, for private account and for export; and the following order is deemed necessary and appropriate in the public interest and *to promote the national defense*." Amendments to this order were made on June 1, 1942, July 23, 1943, and June 1, 1944, imposing further restrictions on the use, delivery, and acceptance of delivery of benzol (Tr. 41). Similar conservation orders were designed to limit civilian uses of synthetic rubber strictly to uses best designed to further the prosecution of the war (Code of Federal Regulations, Title 32, Chap. 9, Part 938, issued December 31, 1941; amended by P. M. 2016, January 2, 1942; order as amended January 22, 1943, T-1663; General Preference Order No. M-13 revoked and superseded July 1, 1943, by Rubber Order R-1).

PART IV.

SOME THEORIES OF APPELLANT.

In conclusion, we seek to epitomize some of appellant's theories expressed or implied, and to make brief comment thereon.

(1) Appellant contends, that at the time of transportation the motor benzol stood in the name of Defense Supplies and therefore was not "property of the United States", because Defense Supplies was an entity separate and distinct from the United States and from its departments or boards. Any such contention is beside the point at issue. As stated by this Circuit Court of Appeals (*King County v. U. S. Shipping Board (supra)*) "here we are dealing with the status of the property", the status of the corporate entity is another subject. Appellant gives no heed to the necessities and conveniences of actual possession and custody of such property, notwithstanding the determination of our Supreme Court (*United States v. County of Allegheny (supra)*), that after all our Government is an abstraction and its possession of property largely constructive, with the actual possession and custody of Government property in some agency of the United States, be such agency either a natural person or a Government created entity, neither of which is or can be the United States. Though appellant cites several cases, it does not mention a case holding that property standing in the name of a corporate instrumentality of the United States is not the "property of the United States", where such issue was directly raised and determined.

Of course, appellant may not deny that the United States in carrying out its enumerated powers has the right to clothe its activities in corporate form.

(2) In similar vein, appellant contends that property, such as the motor benzol, standing in the name of a corporate instrumentality, such as Defense Supplies, is not "property of the United States" within the purview of the Transportation Act of 1940, because in some Acts Congress has recognized a distinction between the United States and its corporate instrumentality. In support of this contention, appellant suggests that there are various Acts of Congress in which there was placed after the term "United States" other terms specifically designed to include or exclude corporate instrumentalities of the United States. Appellant thereby seeks to say that whenever Congress has intended that the term "United States" should include governmental corporate instrumentalities, Congress has used apt words to indicate such intention. First of all, when enacting Section 321 of the Transportation Act of 1940, Congress acting under the threat of an all-out war had in mind the very subject of "property" for defense and war. Congress not only knew the use in the first World War of governmental corporate instrumentalities to facilitate the functions of Government during war, but Congress had just enacted a law (Section 5d (3) R.F.C. Act) to create these very corporate instrumentalities for defense and war. Congress also knew the existence of numerous decisions directly holding that property standing in the name of such war-time corporate instrumentalities is the "property of the United

States''. There was no need to express such law of the land in Section 321 of the Transportation Act. In many of the Acts cited by appellant, it was necessary for the Congress to make added mention of such government agencies by reason of their corporate nature. From this very corporate nature flow legal consequences, which Congress may desire either to use or to obviate by special statutory provisions, as occasion may require. Indeed, if corporate instrumentalities could in no respect function differently than the natural human agencies of the United States, there would be scant reason to utilize the corporate form, as Congress had just done, for executing governmental powers in and for war.

(3) Appellant contends that the motor benzol was not "military or naval property" moving for "military or naval use", upon divers suggestions, including the fact that the motor benzol at the time of transportation was not in its then form suitable for military or naval use, because so many things had to be done therewith and added thereto. Appellant does not mention the decision of July 8 in *Northern Pacific Railway v. United States* (*supra*) which likely was not known to appellant. But appellant does know the stipulated facts and all the inferences reasonably deducible therefrom, and found below. War and its contemplation not only created Defense Supplies "in order to aid the Government of the United States in its national-defense program", but war and its contemplation created the very Congressional provision under which Defense Supplies was born to purchase and transport supplies required in the manufacture

of supplies necessary to the national defense, all-inclusive and including motor benzol so necessary for the manufacture of 100 high octane and synthetic rubber, so necessary for war. Four months after our country was at war, and before the very first act of Defense Supplies in relation to the motor benzol, its resolutions later amended, there was the Reid-War Production Board war program for the purchase of the motor benzol "through Defense Supplies", "as quickly as practicable", "to be allocated for defense purposes", because "immediate action is imperative", so that "this benzol will be available for synthetic rubber and aviation gasoline". It is to be remembered that the war program for benzol was national in scope and that our benzol here is but a small part of the whole (see War Production Board allocation to Defense Supplies for one month only, Tr. 63-64). Before any purchase of the motor benzol by Defense Supplies, there first was an allocation therefor made by War Production Board. From its transportation under Government Bills of Lading marked "For Military Use", every step taken with reference to the motor benzol was strictly under the control of the United States, acting only for war and solely by and through its war agencies such as War Production Board, Petroleum Administration for War, Office of Rubber Director, Aviation Petroleum Products Allocations Committee, including both the War Department and the Navy Department with their three contracts with Defense Supplies proclaiming that the execution and provisions of these contracts are deemed necessary, for "*the effective and successful prosecu-*

tion of the war", and all for no other possible purpose than the production of aviation gasoline and synthetic rubber for war-use. Thus, the benzol involved in this case was at all times subject to special war controls to channel it as "military or naval property" directly into "military or naval use". It can hardly be argued that if either the War Department or Navy Department itself acquired and transported select lumber to be thereafter processed and fabricated into gun stocks, to be added in turn to many other components and parts and thus made into rifles, that the lumber so acquired and transported was not "military or naval" in character or that its proposed use was not "military or naval". The programmed and actual use of the benzol, as a component of aviation gasoline and synthetic rubber to be used in the direct prosecution of the war, determines both its "military or naval" character and the "military or naval use" for which it was transported. Appellant does concede the "military or naval" character of synthetic rubber and aviation gasoline when and if in the hands of Army and Navy, but we are left to wonder how such "military or naval property" would reach such hands, without the benzol. Appellant does also state (a.b. 42) that the benzol was at most a strategic or critical material for use in connection with other materials in the manufacture or production of components, used with other materials for the production and manufacture of such "military or naval property" as aviation gasoline and synthetic rubber.

(4) Appellant likewise contends that, no matter where, when or why the motor benzol was processed into aviation gasoline and synthetic rubber, the motor benzol could not be "military or naval property" unless and until the products therefrom actually reached the hands of Army or Navy, under Congressional appropriations therefor. Such suggestions are to contend that Congress in using the term "United States" in the Transportation Act of 1940, intended to limit such term to two executive departments, the War Department and the Navy Department. On the contrary, Congress in its wisdom had no such intention, because Congress did not fail to vision that the United States would own and possess, as it did own and possess, property military or naval in character, otherwise than solely through its War and Navy Departments. The programmed and actual use of the motor benzol was financed by the United States, and not otherwise. In the Act whereunder Defense Supplies was created to aid the Government of the United States in its national-defense program, Congress made provision for the funds of Defense Supplies and like war-entities.

(5) Sorely pressed to advance something tenable, appellant suggests inferentially that benzol is found to be the subject of stereotyped conservation orders of war-time administrative boards like so many non-military or non-naval items, and that benzol consequently was during war in the same category of cocoa (a.b. 51) and of tea bags or tea balls (a.b. 53). This sequitur is a bit broader than its premises, and it hides from the stipulated facts.

CONCLUSION.

In conclusion, it is submitted that:

1. The motor benzol at the time of its transportation was "property of the United States" within the meaning of Section 321 (a) of the Transportation Act of 1940.

2. The motor benzol at the time of its transportation was "military or naval property of the United States moving for military or naval use" within the meaning of Section 321 (a) of the Transportation Act of 1940.

3. Appellee, Reconstruction Finance Corporation, is entitled to the benefits of land-grant deductions with respect to all of the shipments of motor benzol, under the provisions of Section 321 (a) of the Transportation Act of 1940, and that, for this reason nothing is due appellant, and the judgment should be affirmed.

Dated, San Francisco, California,
September 6, 1946.

Respectfully submitted,
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(Appendices A, B and C Follow.)



Appendices.



Appendix A

Section 321 of the Transportation Act of 1940 (49 U.S.C.A., Sec. 65 in 1945 Cumulative Annual Pocket Part, page 77) provides:

“Sec. 65. GOVERNMENT TRAFFIC; RATES.

(a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of this title, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to chapters 1, 8, and 12 of this title of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: PROVIDED, HOWEVER, That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: PROVIDED FURTHER, That section 5 of Title 41 shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from September 18, 1940."

Appendix B

The Act of June 7, 1924 (10 U.S.C.A., Sec. 1375, page 237) provides:

“Sec. 1375. CHARGES FOR TRANSPORTATION BY LAND-GRANT RAILROADS SUBJECT TO REGULATIONS BY CONGRESS. Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates for like transportation performed for the public at large, for the transportation of property or troops of the United States over any railroad which under land-grant acts was aided in its construction by a grant of land on condition that said railroad shall be and remain a public highway for the use of the United States, and for which adjustment of compensation is required in accordance with decisions of the Supreme Court construing such land-grant acts, or over any railroad which was aided in its construction by a grant of land on condition that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service.”

Appendix C

Section 5d (3) of the Reconstruction Finance Corporation Act, as amended (15 U.S.C.A., Sec. 606b (3), 1945 Cumulative Annual Pocket Part, pp. 164 and 165), provides:

“In order to aid the Government of the United States in its national-defense program, the Corporation is authorized——

* * * * * *

(3) When requested by the Federal Loan Administrator, with the approval of the President, to create or organize, at any time prior to July 1, 1943, a corporation or corporations, with power (a) to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President; (b) to purchase and lease land, purchase, lease, build, and expand plants, and purchase and produce equipment, facilities, machinery, materials, and supplies for the manufacture of strategic and critical materials, arms, ammunition, and implements of war, any other articles, equipment, facilities, and supplies necessary to the national defense, and such other articles, equipment, supplies, and materials as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection therewith; * * * (g) to take such other action as the President and the Federal Loan Administrator may deem necessary to expedite the national-defense program, but the aggregate amount of the funds of the Reconstruction Finance Corporation which may be outstanding at any one time for carrying out this clause (g)

shall not exceed \$200,000,000: * * * The Corporation may make loans to, or purchase the capital stock of, any such corporation for any purpose within the powers of the Corporation as above set forth related to the national-defense program, on such terms and conditions as the Corporation may determine."

No. 11,352

United States
Circuit Court of Appeals
For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corpora-
tion,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellee.

REPLY BRIEF FOR APPELLANT

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United States
Circuit Court of Appeals
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SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

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RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellee.

REPLY BRIEF FOR APPELLANT

APPELLEE'S SUMMARY OF CASE

(Appellee's Brief, Pages 1-8)

The facts are stipulated and so the Court in its consideration of this case can refer to the complete text of the Stipulation of Facts and the exhibits attached thereto. Any restatement of the facts in the interest of brevity, whether made by Appellant or by Appellee, may give rise to implications not justified by the complete text,

or may not portray adequately and correctly the situation as presented therein. A few examples will serve to emphasize this and the necessity of referring to the complete text.

On page 2 of Appellee's brief it is stated that "The transportation of the motor benzol was on government bills of lading, and every bill of lading was marked 'For Military Use' ". The record (Tr. 41, 43) shows that these bills of lading were prepared and furnished by the agent of Defense Supplies Corporation (hereinafter referred to as Defense Supplies) under instructions from Defense Supplies to mark on all of said bills of lading "For Military Use." Thus, Defense Supplies put on each bill of lading prepared and furnished by it a self-serving statement as a basis for claiming the right to make land-grant deductions. As said in *Louisville & Nashville R.R. v. United States*, 267 U.S. 395, 398, 69 L.Ed. 678: "But the mere use of government forms of bills of lading is not conclusive on the question of ownership of property at the time of transportation and does not give the United States the right of transportation at land-grant rates." Likewise, the fact that Defense Supplies put the words "For Military Use" on the bills of lading did not make the property military property at the time of its transportation or make its movement at that time a movement for military use.

Beginning at the bottom of page 4 of Appellee's brief it is stated that "On April 2, 1942, the *War Production Board* in writing (Tr. 35) recommended that Defense Supplies purchase (as a commencement) 50,000,000 gallons of motor benzol for essential use in the synthetic rubber program for manufacture of styrene, and also for essential

use as an *addition* to 100 octane gasoline, either as benzol or as a *derivative of benzol*." The record shows that the War Production Board recommended, insofar as Defense Supplies was concerned, the purchase of 50,000,000 gallons of motor benzol for the purpose of creating a stockpile of that material (Tr. 35-40).

Beginning at the bottom of page 6 of Appellee's brief it is stated: "Thus, 9.66% of the original motor benzol was used in the production of rubber products for Army and Navy in and for war." The Stipulation contains the statement (Tr. 50): "9.66% of the motor benzol was used in the production of rubber products sold to the Army and Navy for their uses" and not that contained in Appellee's brief.

In other parts of the brief reference to the complete text of the Stipulation of Facts and the exhibits thereto is necessary in order to get the complete picture. Thus, beginning on page 33 of Appellee's brief it is stated that "they [supply contracts] provided that certificates of inspection be delivered to authorized representatives of the *War and Navy Departments*; and officials and employees of the *War and Navy Departments* were made agents of Defense Supplies to accept delivery of the aviation gasoline." The situation here was that Defense Supplies had contracts with oil companies for the purchase of aviation gasoline of a certain quality, and Defense Supplies had entered into a contract for sale of gasoline of the same quality to the Army and Navy. The contracts of Defense Supplies with the oil companies provided for inspection of the gasoline to determine whether it was of the required quality or not, and it was further provided that the certificates of inspection "shall be issued in

five counterparts, one set of which shall be delivered forthwith to the authorized officer or employee of the War or Navy Departments'' (Tr. 115-116 and 145-146), purchasers from Defense Supplies of the same quality of aviation gasoline which Defense Supplies was purchasing from the oil companies. In fact, the terms of the contract under which the Army and Navy purchased gasoline from Defense Supplies required that the Army and the Navy be furnished with a copy of the inspection certificates (Tr. 165). It is true that the proper officers and employees of the War and Navy Departments, or either of them, were made agents of Defense Supplies to accept delivery of the aviation gasoline, but that did not constitute delivery to the Army and Navy. After they had accepted delivery for Defense Supplies, delivery was then made to the Army and Navy (Tr. 162, 172, 173).

On page 8 of Appellee's brief it is stated "The afore-said summary presents ultimate facts found below on the stipulated evidence, and the evidentiary facts will be detailed in our argument." The facts as set forth in Appellee's "Summary of Case" are not the ultimate facts as found by the Court below on the stipulated evidence but are taken from or based on the Stipulation of Facts. The findings of fact by the Court below are set out on pages 208 to 213, both inclusive, of Transcript of Record.

THE TRANSPORTATION ACT OF 1940. ITS HISTORY
AND CONSTRUCTION.

(Appellee's Brief, Pages 8-12)

In construing Section 321, Title III, Part II of the Transportation Act of 1940, it is not necessary to refer to cases dealing with acts involving facts and circumstances different from those prevailing in this case because the Supreme Court of the United States has stated the rule of construction to be applied. That Court has held that a contract resulted when the railroads constructed their lines under the proposals made by the United States in the land-grant Acts. In *United States v. Galveston etc. Ry. Co.*, 279 U.S. 401, 73 L.Ed. 760 (cited by Appellee p. 10) the Court held (p. 404) "the terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction."

In *Lake Superior & M. R.R. Co. v. United States*, 93 U.S. 442, 23 L.Ed. 965, the Court held (p. 454):

"It might be very convenient for the Government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable."

The proposal made by the United States in Section 321 became a contract upon acceptance by the carriers and "the terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction." Under the terms of this contract the obligation of land-grant aided carriers under the land-grant Acts was, to some extent, contracted

or made less burdensome in that the right of the United States to make deductions from tariff rates for the transportation of government property was limited to the transportation of "military or naval property of the United States moving for military and naval and not for civil use." On the other hand, the obligation was expanded to make land-grant deductions applicable to the transportation of the property of the members of the military and naval forces of the United States when such members are traveling on official duty. Prior to the passage of the Transportation Act of 1940, it had been held in *United States v. Galveston etc. Ry. Co.*, *supra*, that the right of the United States to make land-grant deductions was not applicable to the transportation of the property of members of the armed forces of the United States traveling on official duty.

In addition to the expansion of the obligation of land-grant carriers, they, including Appellant, released to the United States certain claims under the land-grant Acts. While Appellee apparently seeks to leave the impression that the claims released were not substantial, the Secretary of the Interior, who was given supervision by Section 321(b) of these releases for the Government, apparently thought differently. See official press release of Department of Interior, made just after approval of the releases filed by Southern Pacific Company and its subsidiaries, included in Appendix hereto.

THE MOTOR BENZOL WAS NOT AT THE TIME OF ITS TRANSPORTATION "PROPERTY OF THE UNITED STATES", WITHIN THE MEANING OF SECTION 321(a) OF TITLE III, PART II OF THE TRANSPORTATION ACT OF 1940.

(Appellee's Brief, Pages 13-27)

The heading on page 13 of Appellee's brief is: "THE MOTOR BENZOL, NAKED LEGAL TITLE TO WHICH AT THE TIME OF ITS TRANSPORTATION WAS IN THE NAME OF A CORPORATE INSTRUMENTALITY OF THE UNITED STATES, SUCH AS DEFENSE SUPPLIES CORPORATION, WAS 'PROPERTY OF THE UNITED STATES' WITHIN THE MEANING OF PARAGRAPH (A) OF SECTION 321 OF THE TRANSPORTATION ACT OF 1940, AND THE UNITED STATES WAS THE REAL AND BENEFICIAL OWNER THEREOF."

There is no evidence whatever that Defense Supplies held only the naked legal title to the motor benzol at the time of its transportation. On the contrary, it is alleged in the Answer filed by Defense Supplies (Tr. 27) and agreed in the Stipulation of Facts that at the times of said transportation said motor benzol was purchased and owned by and was the property of Defense Supplies (Tr. 42). Attention is called to the fact that under the provisions of the Charter of Defense Supplies its stockholder was not "liable for the debts, contracts, or engagements of the corporation except to the extent of unpaid stock subscriptions" (Tr. 56).

The cases cited by Appellee in support of its position that the property of Defense Supplies was the property of the United States, are based upon principles different from those involved in this case and serve to emphasize

that those cases are not properly applicable to this case. One case cited by Appellee (p. 22) is *Cherry Cotton Mills, Inc. v. United States*, 59 F. Supp. 122. Here we refer to the decision (March 25, 1946) of the Supreme Court of the United States in that case, in Supreme Court L. Ed. Advance Opinions Vol. 90-11, p. 704. Cherry Cotton Mills, which was indebted to R.F.C., sued the United States for processing and floor taxes paid by the Company under the Agricultural Adjustment Act. It was held that the United States could counterclaim in the suit against it for the amount due by Cherry Cotton Mills to R.F.C. That decision involved the construction of the statute which permits the United States to counterclaim in suits brought against it, and was based on the ground as stated by the Court that "Every reason that could have prompted Congress to authorize the Government to plead counterclaims for debts owed to any of its other agencies applies with equal force to debts owed to R.F.C." The Court, however, pointed out that the Government's right to counterclaim rested on different principles from those involved in such cases as this one. The Court said:

"Nor is this Congressionally granted power to plead a counterclaim to be reduced because in other situations and with relation to other statutes, we have applied the doctrine of Governmental immunity or priority rather strictly. The Government here sought neither immunity nor priority. Its right to counterclaim rests on different principles, one of which was graphically expressed by the sponsors of the Act of which Section 250(2) is a part: It is 'as much the duty of the citizen to pay the Government as it is the duty of the Government to pay the citizen.' 59 Cong. Globe 1674, 37th Cong. 2d Sess."

The case of *King County, Washington, et al. v. U. S. Shipping Board Emergency Fleet Corp.* (C.C.A. 9), 282 Fed. 950, cited on page 17 of Appellee's brief, needs no extended comment. In that case this Court merely held that property purchased by the Fleet Corporation with funds especially appropriated by Congress for that purpose was not subject to taxation by State authorities because the property so purchased was that of the United States and not that of the Fleet Corporation which merely held the naked legal title thereto. A like situation was presented in *U. S. Shipping Board Emergency Fleet Corp. v. Delaware County, Pennsylvania* (C.C.A. 3), 17 F.(2d) 40. The two cases last referred to are cited in the Opening Brief for Appellant, pages 27-29.

About two months prior to its decision in the *King County, Wash.* case, *supra*, this Court in *United States v. Matthews* (C.C.A. 9), 282 Fed. 266, held that the Fleet Corporation and not the United States was the proper entity to recover money paid out by the Fleet Corporation by error and mistake.

Appellee also cites and quotes (p. 16) from the opinion in *Defense Supplies Corporation v. United States Lines Co. et al.*, 57 F. Supp. 291. Here reference is made rather to the decision on appeal in *Defense Supplies Corporation v. United States Lines Co. et al.* (C.C.A. 2), 148 F.(2d) 311. The Court stated that the question was "whether the Defense Supplies Corporation may bring suit against the United States under the Suits in Admiralty Act" and held that such suit could not be maintained because a suit by Defense Supplies was nothing more than an action by the United States against the United States. In other words, as between Defense Sup-

plies and the United States, its creator, there is not the status of the separate corporate entity which prevails in other situations.

In *Clallam County v. United States*, 263 U.S. 341, 68 L.Ed. 328, it was held that a state cannot tax the property of a liquidating corporation which, though formed under its laws, was brought into existence and operated by the United States purely as an instrument of war, whose property was furnished, whose stock and bonds were held, and whose assets realized from liquidation would be taken over by the United States alone. The Court stated the facts briefly as follows (p. 344):

“In short the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States and was used by it solely as means to that end, and when the war was over it stopped its work except so far as it found it necessary to go on in order to wind up its affairs. When the winding up is accomplished there will be a loss, but whatever assets may be realized will go to the United States. Upon these facts immunity is claimed from taxation by a State.”

Erickson v. United States, 264 U.S. 246, 68 L.Ed. 661, cited by Appellee on page 25, involved the question whether the District Court had jurisdiction of a suit in which the United States joined as plaintiff with United States Spruce Production Corporation. In sustaining jurisdiction the Court said (p. 249):

“The United States is one of the plaintiffs and joined in the suit by way of asserting and seeking to enforce a right in which it claims to have a direct

and legal interest. Judged by the complaint, the claim made by the United States is not frivolous or wholly without support but is real and substantial. In other words, it calls for consideration and determination. This involves an exercise of jurisdiction, whether the ultimate decision sustains or rejects the claim. Jurisdiction is power to decide the case either way, as the merits may require."

The cases herein referred to as well as the others cited by Appellee show that they involve circumstances and principles different from those here involved. The question here involved is whether Defense Supplies was entitled to the immunity enjoyed by the United States under contracts with land-grant carriers to have property transported at less than commercial tariff charges.

In *Reconstruction Finance Corporation v. Menihan*, 312 U.S. 81, 85 L.Ed. 595, the Court, referring to R.F.C., held:

"While it acts as a governmental agency in performing its functions (see *Pitman v. Home Owners' Loan Corp.* 308 U.S. 21, 32, 33), still its transactions are akin to those of private enterprises, and the mere fact that it is an agency of the Government does not extend to it the immunity of a sovereign."

The United States owns all of the stock of the R.F.C., which in turn owned all of the stock of Defense Supplies. While Defense Supplies may have acted as a governmental agency in performing its functions, still its transactions were akin to those of private enterprises and the mere fact that it was an agency of the Government did not extend to it the immunity of the sovereign from the payment of full commercial rates.

As said in *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389, 83 L.Ed. 784:

“Congress may, of course, endow a governmental corporation with the Government’s immunity. But always the question is: Has it done so?”

The immunity of the sovereign from the payment of taxes, except local taxes on real estate, was extended to Defense Supplies (see opening brief for Appellant, p. 39). The privilege of the sovereign to the free use (Tr. 56) of the United States mails was extended to Defense Supplies, but the immunity of the sovereign from the payment of the full commercial tariff rates on the transportation of certain property, as provided in the contracts between the United States and the carriers, was not extended to Defense Supplies.

Defense Supplies was created in pursuance of authority granted by Congress, and Congress has recognized that there is a distinction between property owned by the United States and that owned by a corporation in which the United States owns the entire outstanding capital stock. See 46 U.S.C.A., Sec. 741, quoted on page 66 of Appellant’s opening brief.

The cases showing that Defense Supplies was a corporate entity separate and distinct from the United States and from its departments or boards, and that the property of the corporation was not the property of its stockholder (and it should be borne in mind that R.F.C. and not the United States was the stockholder) are reviewed in the opening brief for Appellant (pp. 30-41). Appellee, however, in its brief (pp. 26 and 45), states that in this case we are not dealing with the status of the corporate

entity but with the status of the property. The status of the property as alleged by Defense Supplies in its Answer in this case, and as agreed in the Stipulation of Facts, was that the motor benzol was purchased and owned by and was the property of Defense Supplies at the time of its transportation. There is neither allegation nor evidence that the motor benzol was purchased with money appropriated by Congress for that purpose, as was the case of the property involved in *King County, Washington v. U. S. Shipping Board Emergency Fleet Corporation, supra*, decided by this Court.

THE MOTOR BENZOL AT THE TIME OF ITS TRANSPORTATION WAS NEITHER PROPERTY OF THE UNITED STATES NOR MILITARY OR NAVAL PROPERTY OF THE UNITED STATES AND IT WAS NOT MOVING FOR MILITARY OR NAVAL USE WITHIN THE MEANING OF THAT LANGUAGE AS USED IN SECTION 321(a).

(Appellee's Brief, Pages 27-44)

In its opening brief Appellant reviewed the facts and authorities showing that the motor benzol was not military or naval property of the United States (pp. 42-53); that the motor benzol was not at the time of its transportation moving for military or naval use (pp. 54-56), and that the motor benzol was at the time of its transportation neither property of the United States nor military or naval property of the United States and that it was not moving for military or naval use within the meaning of that language as used in Section 321(a) (pp. 56-72). It is unnecessary to review again those facts and authorities but some further comment is desirable in the light of the argument by Appellee.

The substance of the argument for Appellee beginning on page 27 of its brief under the heading "THE MOTOR BENZOL, AT THE TIME OF ITS TRANSPORTATION, WAS 'MILITARY OR NAVAL' PROPERTY OF THE UNITED STATES AND WAS 'MOVING FOR MILITARY OR NAVAL AND NOT FOR CIVIL USE,' WITHIN THE MEANING OF SECTION 321(a) OF THE TRANSPORTATION ACT OF 1940" is that because the Transportation Act of 1940 was enacted after the beginning of World War II, the exception contained in Section 321(a) providing "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use" should be given a broader interpretation than the language used by Congress justifies. This argument was accepted by the trial court in this case. In its opinion, after referring to the outbreak of World War II and its horrors (Tr. 206), the Court said (Tr. 207):

"Hence, it is that a just and fair adjudication of the meaning of the statute's language cannot be made without considering the overall effect of the concept of total global warfare."

Such argument was apparently accepted in the case of *Northern Pacific Railway Company v. United States* (C.C.A. 7), (.....), cited on page 27 of Appellee's brief, in which the property was owned by the United States and not by one of its corporations. A similar argument was made by the United States in *United States v. Powell* (C.C.A. 4), 152 F.(2d) 228, but in that case the Court held (p. 229):

“The Transportation Act was passed before the Lend-Lease Act, 22 U.S.C.A. Sec. 411 et seq. Sympathies in this country then ran strongly against the Axis powers; it was pretty generally agreed that we should help the enemies of the Axis; there was real fear that the United States might become involved in the conflict; swift measures for defense had to be perfected on an extremely wide scale. Yet, with this picture before it, we must presume that Congress deliberately used the words ‘military or naval’ in their generally accepted meaning.”

In substance Appellee is contending that the exception contained in Section 321(a) should not be construed as written “except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use,” but as if Congress had written the exception as follows:

“except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of materials owned by Government corporations and moving for ultimate sale to and use by private concerns in the manufacture or production of property suitable for military or naval use.”

Of course, Congress knew at the time it enacted the Transportation Act of 1940 that World War II was being waged; that the United States might be drawn into that war; that about three months prior to the enactment of that legislation it had authorized the creation of corporate instrumentalities of the United States such as Defense Supplies, to engage in the buying and selling of strategic

and critical materials and in materials for the manufacture or production of military or naval property, and that less than a month prior to the enactment of the Transportation Act of 1940 Defense Supplies had been created pursuant to authority given by it to engage in the buying and selling of strategic and critical materials and in materials suitable for the manufacture of military or naval property. Congress, however, in writing the exception, used the language "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use."

Section 321(a) also shows that Congress used considerable care in its preparation. Congress enlarged the obligation of the carriers by providing that the right of the carriers to charge the full commercial rates should not apply to the transportation of the property of the members of the military or naval forces of the United States when such members are traveling on official duty. Had Congress intended that the right of the carriers to full commercial rates under Section 321(a) should not apply to the transportation of materials owned by Government corporations moving for ultimate sale to and use by private concerns in the manufacture or production of property suitable for military or naval use, it would undoubtedly have used apt language to indicate such intention as it used apt language to indicate that the carriers could not charge the full commercial rates for the transportation of the property of members of the military or naval forces of the United States when traveling on official duty.

The fact that "any civilian use of both motor benzol and synthetic rubber was, at all times pertinent here,

only the use permitted under war-time conservation orders designed strictly to limit civilian use thereof for purposes best designed to further defense and war" (Appellee's brief, pp. 43-44), and the fact that the War Production Board issued Conservation Order No. M-137 (7 F.R. 2944), imposing restriction upon the use and delivery of benzol and that Order began with the words:

"the fulfillment of requirements *for the defense of the United States* has created a shortage in the supply of *benzine (benzol) for defense*, for private account, and for export; and the following order is deemed necessary and appropriate in the public interest and *to promote the national defense.*"

are without significance in determining whether the motor benzol was at the time of its transportation military or naval property. See Appellant's opening brief (pp. 50-53).

In the Federal Register for April, 1942, alone there are 43 conservation, limitation or other orders issued by the War Production Board beginning with language the same or substantially the same as that with which Conservation Order No. M-137 began. For example, Conservation Order No. M-125 (7 F.R. 2709), imposed restrictions on sales, deliveries and cutting of Loofa Sponges as well as restrictions on the use of Loofa Sponges. This Order began as follows:

"The fulfillment of requirements *for the defense of the United States* has created a shortage in the supply of *Loofa Sponges for defense*, for private account and for export; and the following Order is deemed necessary and appropriate in the public interest and *to promote the national defense.*" (Emphasis supplied.)

It seems unnecessary to argue further that the motor benzol was not at the time of its transportation moving for military or naval use. It was purchased by Defense Supplies in pursuance of a recommendation made by the War Production Board that a stockpile of motor benzol be created. Motor benzol was purchased by Defense Supplies pursuant to resolutions of its Executive Committee authorizing the purchase, storage, processing and disposition of the motor benzol and by-products resulting therefrom.

As appears from the exhibit to the Complaint (between pp. 10 and 25 of the Transcript) 6,226,551 pounds of motor benzol in the aggregate were transported. Of this quantity 1,088,400 pounds, or about 17½%, were placed in storage over a year before Defense Supplies entered into its first contract for the sale of benzol, that is, the contract with Wilshire Oil Company dated November 16, 1943 (Tr. 47); 3,880,760 pounds or slightly over 62% of the total quantity of motor benzol were placed in storage over seven months before the first contract of sale was entered into. This storage of the motor benzol was not a military or naval use, and its subsequent processing and sale were not military or naval uses.

Respectfully submitted,

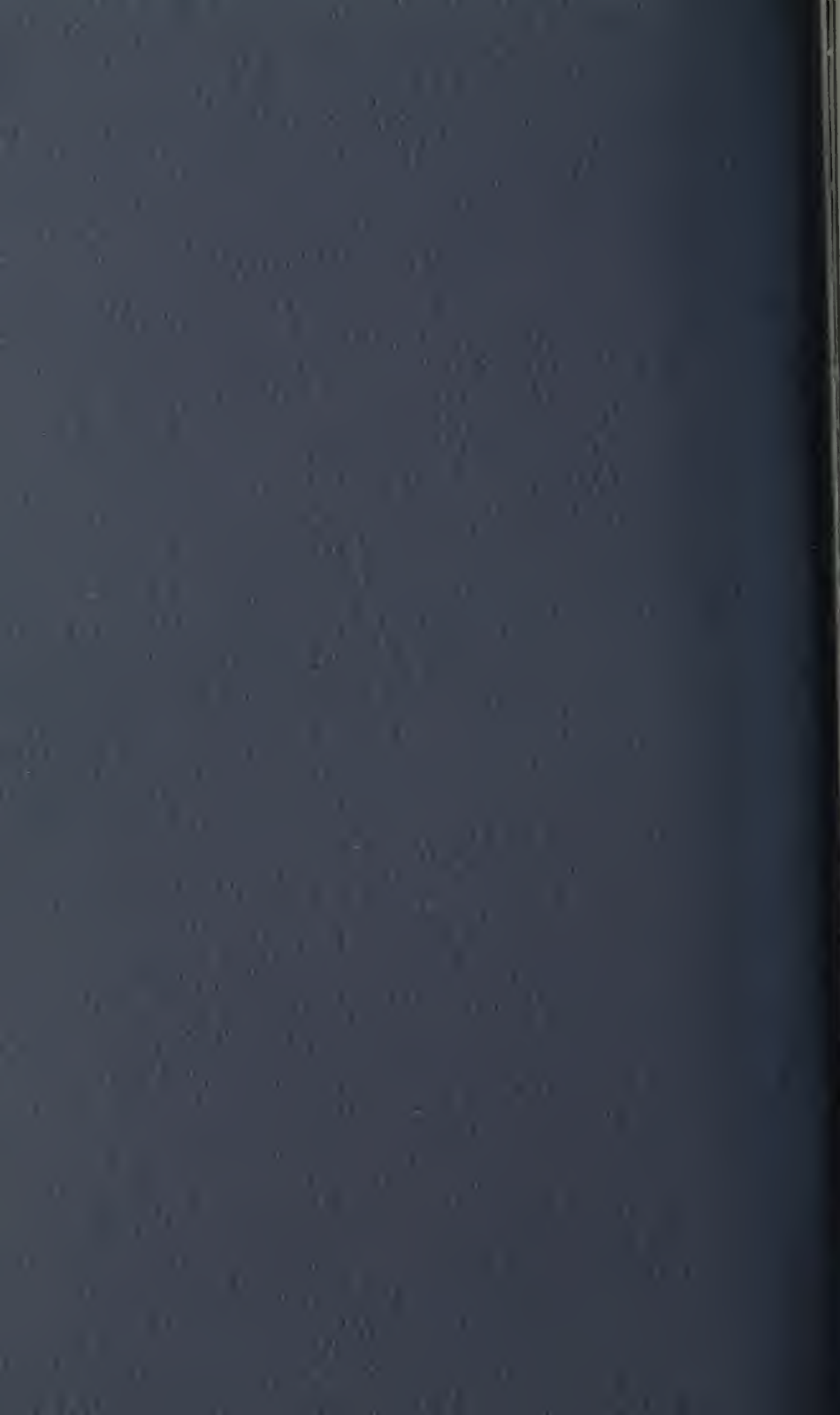
C. O. AMONETTE,

CHARLES W. BURKETT, JR.

Attorneys for Appellant.

Dated at San Francisco, California,
September 20, 1946.

(APPENDIX FOLLOWS)



APPENDIX

DEPARTMENT OF THE INTERIOR

Information Service

GENERAL LAND OFFICE

For Release MONDAY, DECEMBER 30, 1940.

Relinquishing the right of the Southern Pacific Railroad to claim more than 2,000,000 acres of public land in Southern California, a land grant claim release submitted by that railroad today was approved by Secretary of the Interior Harold L. Ickes.

Approval of the release clears the track for the Southern Pacific to take advantage of increased rates for certain classes of Government freight and passenger business as authorized by the Transportation Act of 1940. Under that Act, roads originally constructed with the aid of grants of public land may discontinue preferential reduced rates accorded the Government on certain forms of traffic if, as and when the roads receive approval by the Secretary of the Interior of a formal release of any claim under such grants.

To date, 24 such releases have been approved by the Secretary of the Interior. Each of these, however, unlike the Southern Pacific release, embraced grants which had been completed and closed for some time, and no question of relinquishment of pending claims for land was involved.

First of the Nation's railroads to relinquish their right to claim grants of land made more than 75 years ago, but not yet completely adjusted and closed, the Southern

Pacific release embraces approximately 2,109,000 acres of land which General Land Office records reveal, still were due the road to complete the grant, but which now have been relinquished in favor of the opportunity to establish increased rates for Government traffic.

Involving the Central Pacific, the main line and the branch line of the Southern Pacific, original grants to these roads, made in 1864, 1866 and 1871, respectively, totalled about 16,835,000 acres of public domain. Of this original grant, the roads received title to approximately 14,725,000 acres from the United States. Claims for the 2,109,000 deficiency, brought about by insufficient suitable public land in the area to meet the requirements of the original grant, now have been released by Southern Pacific.

Although formal approval by the Secretary of the land grant claim releases submitted by the railroads paves the way for the initiation of increased rates for the Government business, it was emphasized today that, under the Act, the Department of the Interior maintains no jurisdiction over the matter of railroad rates or the date upon which increases may be put into effect.

The land grant territory embraced in the Southern Pacific release includes areas traversed by its predecessor, the Central Pacific Railroad Company, from Sacramento, California, eastward to a junction with the Union Pacific Railway near Ogden, Utah, the main line of the Southern Pacific from San Jose through Mohave to Needles, California, and the branch line of the Southern Pacific from Mohave by way of Los Angeles to the Colorado River, at Yuma, Arizona.

The release also affords opportunity for the initiation of increased rates in territory traversed by the Oregon and

California Railroad from Portland through Ashland, Oregon, to the California State line, and the California and Oregon Railroad from Roseville, California, northerly to a junction with the Oregon and California at the Oregon State line.

P.N. 126554

No. 11353

United States
Circuit Court of Appeals

For the Ninth Circuit.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Appellants,

vs.

UNITED STATES OF AMERICA, for the use of
BERT TURNER, FRANK E. HINMAN and
GARLAND, D. ENGLAND,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

AUG 8 - 1946

PAUL P. O'BRIEN,

CLERK

No. 11353

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona

No. Civil 320-Tucson

UNITED STATES OF AMERICA for the use of
BERT TURNER, FRANK E. HINMAN, and
GARLAND D. ENGLAND,

Plaintiff,

vs.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants.

COMPLAINT UNDER THE MILLER ACT FOR
LABOR AND MATERIAL FURNISHED
ON GOVERNMENT CONTRACT

Comes now the Plaintiff and for cause of action
against the Defendants, complains and alleges:

I.

The jurisdiction of the above entitled Court in
this action depends upon the following facts: that
the defendant, Basich Brothers Construction Co.,
made and entered upon the performance of a con-
tract, exceeding \$2,000.00 in amount, with the
United States of America for public work, which
said contract was to be and was performed and ex-
ecuted in the County of Pima, State of Arizona;
that the defendant, Hartford Accident and Indem-

nity Company, was and is a corporate surety upon a payment bond furnished by said Basich Brothers Construction Co., to the United States of America for the payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, all under, and pursuant to, the Act of Congress known as the Miller Act, approved August 24, 1935, c 642, 49 Stat. 793, 40 USCA 270a, et seq., 9A FCA title .40, 270a et seq; [8] and the further fact that the said use plaintiffs furnished labor and material in the prosecution of the work provided for in such contract, for which payment, although due, has not been made, as hereinafter more particularly alleged and set forth.

II.

That the said use plaintiffs, Bert Turner, Frank E. Hinman and Garland D. England, are and were in all times hereinafter mentioned, citizens and residents of the State of Arizona.

III.

That the defendant, Basich Brothers Construction Co., is a corporation, organized and existing under the laws of the State of California, and that the defendant Hartford Accident and Indemnity Company is a body corporate, duly incorporated under the laws of the State of Connecticut, and as Plaintiff is informed and believes and therefore alleges, authorized to act as surety under Act of Congress approved August 13, 1894 and amended by Act of Congress approved March 23, 1910.

IV.

That on or about the 25th day of January, 1945, the defendant, Basich Brothers Construction Co., made and entered into a certain contract with the Government of the United States for furnishing the material and for performing the work (except material and equipment designated to be furnished by the Government) for constructing taxiways, warm-up and parking aprons, airfield lighting, drainage facilities and water service lines, together with appurtenant facilities, Job, No. Davis-Monthan ESA 210-6, 210-8 and 210-9, at Davis-Monthan Field, Tucson, Arizona (Contract No. W-04-353-Eng.-1302, in the amount of \$942,816.00).

V.

That for the purpose of complying with the said Act of Congress requiring said contractor to furnish a bond for the [9] protection of all persons supplying labor and materials in the prosecution of the work provided in said contract for the use of each such person, the said contractor and the said defendant Hartford Accident and Indemnity Company did make and enter into a payment bond, copy of which is hereunto annexed, marked "Exhibit A" and for all purposes by reference made a part of this complaint. And said payment bond was furnished to and accepted by the Government for the purpose aforesaid. And thereupon the said contractor entered upon the performance and execution of said contract.

VI.

That in the doing and performance of said contract, by said contractor, large quantities of rock, sand, gravel, concrete, cement, asphalt, and similar materials were required by said contractor to be used by said contractor in and upon the improvements and facilities to be made and constructed under the terms of said contract. That for the purpose of obtaining rock, gravel, sand and other materials, to be used by said contractor in performance of said contract, the said contractor employed Andrew Duque and Carson Frazzini, a copartnership, doing business under the name of Duque and Frazzini, General Contractors, as sub contractors, to extract such materials from certain pits and premises in the vicinity of said Davis-Monthan air base, in Pima County, Arizona, designated by said contractor, and to prepare such materials for use by said contractor in the performance of said contract and under contractor's direction and supervision, and for that purpose said contractor made and entered into a sub-contract agreement with said Duque & Frazzini, copy of which is hereunto annexed and marked "Exhibit B" and for all purposes by reference is made a part of this complaint. [10]

VII.

That said contractor, among other things, required said sub-contractor Duque & Frazzini to furnish contractor with a 100% combination bond (labor, materials, and performance) pursuant to which requirement the said sub-contractor did furnish such

bond in the principal sum of \$101,745.55 with the Glens Falls Indemnity Company of Glens Falls, N.Y. as surety thereon, copy of which bond is hereto attached, marked "Exhibit C" and for all purposes by reference made a part hereof. Thereupon the said contractor entered upon the performance of the work required under terms of said sub-contract agreement.

VIII.

That thereafter on or about the 19th day of March, 1945, the said sub-contractor, Duque & Frazzini, rented certain equipment consisting of trucks, from the use plaintiff, Bert Turner, to be used and which were used in the performance of work and the production of materials under said sub-contract agreement between said Duque & Frazzini and said prime contractor, Basich Brothers Construction Co., and said equipment was used in the performance of work provided for in said contract with the United States government above referred to.

That said use plaintiff's trucks were used by said sub-contractor under said rental agreement for a period of 911½ hours from March 20, 1945 to and including May 1, 1945, for which use said Duque & Frazzini agreed to pay to said Bert Turner, rental at the rate of \$1.25 per hour, a total amount of \$1,139.38; and from May 2, 1945 to and including June 8, 1945 said trucks were rented for 723 hours, for which use the said sub-contractor agreed to pay said Bert Turner at the rate of \$1.75 per hour, a total amount of \$1,265.25. That the total sum and amount past

due and owing said Bert Turner for rental of said [11] trucks for said period of time amounts to the sum of \$2,404.63, no part of which has been paid by said Duque & Frazzini or by any person, or at all, although demand has been repeatedly made upon said prime contractor and said sub-contractor for payment thereof.

That June 8, 1945 was the last date on which said Bert Turner furnished or rented such trucks for which claim is made; that within 90 days from said June 8, 1945, said Bert Turner gave written notice to said contractor, Basich Brothers Construction Co., of his claim for labor and material so furnished and supplied as aforesaid, stating the amount of said claim and the name of the parties to whom the material was furnished and supplied and for whom the labor was done and performed by him as aforesaid. Such notice was served by mailing the same, by registered mail postage prepaid, in an envelope addressed to said contractor, Basich Brothers Construction Co., at its place of business in both Tucson, Arizona, and Alhambra, California.

IX.

That on or about the 18th day of April, 1945, the said sub-contractor, Duque & Frazzini, rented certain equipment consisting of trucks, from the use plaintiff Frank E. Hinman, to be used and which were used in the performance of work and the production of material under said sub-contract agreement between said Duque & Frazzini and said prime contractor, Basich Brothers Construction Co., and

said equipment was used in the performance of work provided for in said contract with the United States Government above referred to.

That said use plaintiff's trucks were used by said sub-contractor under said rental agreement for a period of 362½ hours, from April 18, 1945, to and including May 1, 1945, for [12] which use said Duque & Frazzini agreed to pay said Frank E. Hinman rental at the rate of \$1.25 per hour, or a total of \$453.13; and from May 2, 1945 to and including June 8, 1945, said trucks were rented for 744½ hours, for which use the said sub-contractor agreed to pay said Frank E. Hinman rental at the rate of \$1.75 per hour or a total amount of \$1,302.87.

In addition to that, on or before June 8, 1945, the said Frank E. Hinman performed one day's labor for said sub-contractor, in the doing of said work at an agreed price of \$15.00 per day.

That the total claim for truck rental and labor, past due and owing said Frank E. Hinman for said period of time amounts to the sum of \$1,771.00, no part of which has been paid by said Duque & Frazzini or by any person, or at all, although demand has been repeatedly made upon said prime contractor and said sub-contractor for payment thereof.

That June 8, 1945 was the last date on which said Frank E. Hinman performed labor or furnished such trucks for which claim is made; that within 90 days from said June 8, 1945, said Frank E. Hinman gave written notice to said contractor, Basich

Brothers Construction Co., of his claim for labor and material furnished and supplied as aforesaid, stating the amount of said claim and the name of the parties to whom the material was furnished and supplied and for whom the labor was done and performed by him as aforesaid. Such notice was served by mailing the same, by registered mail postage prepaid, in an envelope addressed to said contractor, Basich Brothers Construction Co., at its place of business in Tucson, Arizona.

X.

That on or about the 2nd day of May, 1945, the said sub-contractor, Duque & Frazzini, rented certain equipment consisting [13] of trucks, from the use plaintiff, Garland D. England, to be used and which were used in the performance of work and the production of materials under said sub-contract agreement between said Duque & Frazzini and said prime contractor, Basich Brothers Construction Co., and said equipment was used in the performance of work provided for in said contract with the United States Government above referred to.

The said use plaintiff's trucks were used by said sub-contractor under said rental agreement for a period of 165 hours from May 2, 1945 to and including May 31, 1945, for which use said Duque & Frazzini agreed to pay to said Garland D. England, rental at the rate of \$1.75 per hour, a total of \$288.75; and from June 1, 1945 to and including June 7, 1945 said trucks were rented for 41½ hours, for which use the said sub-contractor agreed to pay said

Garland D. England, rental at the rate of \$1.75 per hour, a total amount of \$72.62. That the total sum and amount past due and owing said Garland D. England for rental of said trucks for said period of time amounts to the sum of \$361.37, no part of which has been paid by said Duque & Frazzini or by any person, or at all, although demand has been repeatedly made upon said prime contractor and said subcontractor for payment thereof.

That June 7, 1945 was the last day on which said Garland D. England furnished or rented such trucks for which claim is made; that within 90 days from said June 7, 1945, said Garland D. England gave written notice to said contractor, Basich Brothers Construction Co., of his claim for labor and material furnished and supplied as aforesaid, stating the amount of said claim and the name of the parties to whom the material was furnished and supplied and for whom the labor was done and performed by him as aforesaid. Such notice was served by [14] mailing the same, by registered mail postage prepaid, in an envelope addressed to said contractor, Basich Brothers Construction Co., at its place of business in Tucson, Arizona.

Wherefore the Plaintiff Demands Judgment of the defendants and each of them as follows:

1. In the sum of \$2,404.63 for the use and benefit of the said Bert Turner;
2. In the sum and amount of \$1,771.00 for the use and benefit of the said Frank E. Hinman;

3. In the sum and amount of \$361.37 for the use and benefit of said Garland D. England.

4. For costs of said use plaintiffs in the prosecution of this action and for other relief as may be proper in the premises.

/s/ CLIFFORD R. McFALL

Attorney for the Plaintiff

EXHIBIT "A"

PAYMENT BOND

(Construction)

Pursuant to the Act of Congress, Approved August 24, 1935 (49 Stat. 793; 40 U.S. Code s270a.)

Know All Men By These Presents, That we, Basich Brothers Construction Co., a corporation organized and existing under the laws of the State of California of the city of Alhambra, in the State of California, as Principal, and Hartford Accident and Indemnity Company, a body corporate, duly incorporated under the laws of the State of Connecticut, and authorized to act as surety under the Act of Congress approved August 13, 1894, as amended, by the Act of Congress approved March 23, 1910, whose principal office is located in the City of Hartford, as surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of four hundred seventy-one thousand four hundred eight and 00/100 (\$471,408.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs,

executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition Of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated 25 January, 1945, for furnishing the materials, and performing the work (except materials and equipment designated to be furnished by the Government) for constructing taxiways, warm-up and parking aprons, airfield lighting, drainage facilities and water service line, together with appurtenant facilities, Job. No. Davis-Monthan ESA 210-6, 210-8, and 210-9, at Davis-Monthan Field, Tucson, Arizona (Contract No. W-04-353-Eng.-1302, in the amount of \$942,816.00). [16]

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 25th day of January, 1945, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by the undersigned representative, pursuant to authority of its governing body.

In presence of—

Attest:

**BASICH BROTHERS CON-
STRUCTION CO.**

(Corporate Principal)

(Business Address): P.O. Box 151, 600 South
Fremont Avenue, Alhambra, California.

/s/ DEENIE COULSON

By /s/ N. L. BASICH
President

Attest:

**HARTFORD ACCIDENT AND
INDEMNITY COMPANY**

(Corporate Surety)

(Business Address): 548 So. Spring St., Los An-
geles, Calif.

/s/ ELEANOR G. DAVIS

By /s/ JOE H. BROCK
Attorney-in-Fact

The rate of premium on this is \$5.00 per thousand.
Total amount of premium charges, \$ inc. in Perf.
Bond. [17]

EXHIBIT "B"

SUBCONTRACT AGREEMENT

This Agreement, made this 7 day of February
1945 by and between Basich Brothers Construction

Co., 600 S. Fremont Ave., Alhambra, California, party of the first part, hereinafter called the Contractor, and Duque & Frazzini, P. O. Box 73, Tonopah, Nevada, party of the second part, hereinafter called the Sub-contractor, witnesseth: that

Whereas, the Contractor has heretofore entered into a Contract hereinafter referred to as the original contract, dated January 25, 1945 with War Department, U. S. Engineer Office, 751 S. Figueroa St., Los Angeles, California, hereinafter called the Principal, for the Construction of Taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng.—1302 which contract includes the following described work to be done under this agreement;

Item 9 Gravel embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and sand for 18" -12" -18" portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement concrete airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2.

Now, Therefore, in consideration of the covenants and agreements hereinafter contained and payments to be made as hereinafter provided, the

Contractor and the Subcontractor do hereby mutually agree as follows:

Article I. Performance of Work.

The Subcontractor shall furnish all materials, supplies and equipment, except as otherwise herein provided, and perform all labor required for the completion of the said work in accordance with all provisions of the original contract and of the specifications and plans referred to therein, all of which are hereby made a part of this agreement, and under the direction and to the satisfaction of the Principal's engineer or other authorized representative in charge of said work.

Article II. Commencement of Completion of Work.

The work shall be commenced not later than February 19, 1945, and shall be completed on or before June 3, 1945.

Article III. Changes in the Original Contract.

It is mutually agreed and understood that the Contractor is not an insurer or guarantor of the said work or of any part thereof, or of the performance by the Principal of the original contract as specified therein, or otherwise, and that the Subcontractor shall be bound by any changes or alterations made by the Principal in the said original contract, specifications or plans, or in the amount or

character of said work or any part thereof, to the same extent that the Contractor is bound thereby.

Article IV. Liability of Subcontractor.

The Subcontractor shall hold and save the Contractor harmless from any liability for damage to the said work, or for injury or damage to persons or property occurring on or in connection therewith.

Article V. Warning Signals, Barricades, Etc.

The Subcontractor shall provide, erect and maintain proper warning signals, signs, lights, barricades and fences on and along the line of said work, and shall take all other necessary precautions for the protection of the work and safety of the public.

Article VI. Compensation and Public Liability Insurance.

The Subcontractor, shall at his own expense, provide workman's compensation insurance in accordance with the requirements of the original contract and of all Federal, State and/or municipal laws, ordinances and regulations relating thereto; also, insurance against liability for injury to persons and/or property occurring on or in connection with the work; Provided, that if the Subcontractor fails to provide such insurance, the Contractor is authorized to provide the same and to deduct the amounts of the premiums payable therefor from any moneys at any time due the Subcontractor under this agreement.

Article VII. Patents.

The Subcontractor shall hold and save the Contractor harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, appliance or process furnished or used in or in connection with the performance of the said work.

Article VIII. Subletting and Assignment.

The work shall be performed by the Subcontractor with the assistance of workmen under his immediate superintendence, and shall not be sublet, assigned or otherwise disposed of, either in whole or in part, except with the written consent of the Contractor.

Article IX. Other Subcontracts.

The Subcontractor shall cooperate fully with other subcontractors employed on the work, and shall so plan and conduct his work as not to interfere with their operations or with those of the Contractor. The Contractor will not be responsible for any delays or interference resulting from the acts or operations of other subcontractors.

Article X. Settlement of Controversies.

In the event any controversies should arise, the Contractor and the Subcontractor each will elect a representative, and the representative will in turn elect a third disinterested party to settle controversies. All decisions will be final.

Article XI. Payment for Labor and Supplies.

The Subcontractor shall promptly make payment to all persons supplying him with labor, materials and supplies for the prosecution of the work or in connection therewith. Any such payments not made by the Subcontractor when due may be made by the Contractor and the amounts thereof deducted from any moneys at any time due the Subcontractor under this agreement. [19]

Article XII. Completion Work by Contractor.

If the Subcontractor shall fail to commence the work within the specified time, or to prosecute said work continuously with sufficient workmen and equipment to insure its completion the Contractor within five (5) days will reserve the right to compel the Subcontractor to move in another plant. All cost in connection with moving in, moving out, erection, dismantling, operation, and any other cost in connection with operating and maintaining plant will be paid by the Subcontractor. In the event Basich Brothers Construction Co. plant is used, moving in and moving out expense will be paid by Basich Brothers Construction Co.

Article XIII. Extension of Time.

No extension of the time herein specified for completion will be made in consideration of delays or suspension of work due to the fault or negligence of the Subcontractor, and no extension will be granted that will render the Contractor liable for penalty or damages under the original contract.

Article XIV. Claims for Extra Work or Damages.

The Contractor will pay, for extra work performed and materials furnished by the Subcontractor under written authorization by the Principal's engineer, the actual cost thereof plus a percentage of said cost equal to one-half the percentage received by the Contractor, as and when he is paid therefor by the Principal.

Article XV. Basis and Scope of Payment.

Payment will be made to the Subcontractor for work actually performed and completed, as measured and certified to by the Principal's engineer, at the unit prices hereinafter specified, which prices shall be accepted by the Subcontractor as full compensation for furnishing all material and for doing all work contemplated and embraced in this agreement; also all loss and damage arising out of the nature of the work aforesaid, and for all risks of every description connected with the said work; also for all expense incurred by the Subcontractor by or in consequence of the suspension or discontinuance of the work.

Article XVI. Partial Payment.

Partial payments for work performed under this agreement will be made by the Contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile. In the event the Subcontractor is indebted to the Contractor for cash advances, supplies, materials, equipment, rental,

labor, insurance on labor, or other proper charges against the work, the amount of such indebtedness may be deducted from any payment or payments made under this provision.

Article XVII. Final Payment.

Upon the completion of the Subcontractors contract, the Contractor will pay the remaining amount due him under this agreement within 30 days. All prior partial payments shall be subject to correction in the final payment; Provided, that if, on completion of the said work by the Subcontractor and prior to the completion of the original contract as a whole, the Subcontractor shall demand and receive full payment for his work according to the computations of the Principal's Engineer, any changes thereafter made in said computations shall not inure in whole or in part to the benefit or loss of the Subcontractor. Final payment as herein provided shall release the Contractor from any further obligation whatsoever in respect to this agreement.

Article XVIII. Failure to Enforce Provisions Not a Waiver.

The failure of the Contractor to enforce at any time any of the provisions of this contract or to require at any time performance by the Subcontractor of any of the provisions hereof, shall in no way be construed to be a waiver, nor in any way to affect the validity of this agreement or any part thereof or the right of the Contractor to thereafter enforce each and every such provision.

Article XIX. Penalties.

It is understood that any fines, penalties, levies, assessments, or charges for liquidated damages of any nature made by the Principal upon the Contractor for work done under this agreement will be charged to the Subcontractor.

Article XX. Delays.

The Subcontractor shall have no claim for damages due to delays in delivery of material or failure of the Principal to provide Right Of Way, plans, stakes, or delay from any cause whatsoever.

Article XXI. Special Provisions.

1—All materials to be taken from Mr. and Mrs. Gollbs property.

2—Basich Brothers Construction Co. to pay for all royalties for materials. In the event Mr. and Mrs. Gollbs material pit is exhausted, Basich Brothers Construction Co. will pay royalties for other material in the immediate vicinity.

3—Duque & Frazzini to submit weekly payrolls by Monday night of each week for the previous week which closes on Saturday at Midnight to Basich Brothers Construction Co. Basich Brothers Construction Co. to pay labor, compensation, insurance, public liability, property damage, Arizona employment insurance, Federal Old Age, Excise Tax on Employers and any other insurance on labor and charge same to Duque & Frazzini, which amounts are to be deducted from amount earned.

4—Duque & Frazzini to pay Arizona Tax Commission for privilege of doing business in Arizona.

5—Duque & Frazzini to erect two plants, each to produce 800 c.y. of suitable material to be used in connection with the contract.

6—Duque & Frazzini to stockpile rock and sand for concrete pavement nearest to second party's plant. Same thing applies to rock and sand for asphalt concrete pavement.

7—Rock furnished for Items 21 and 22 shall be 3" (three-inch) maximum; prices furnished by Duque & Frazzini on these Items are predicated on the 3" maximum rock.

8—Permission is hereby granted to Duque & Frazzini to subcontract a portion of their contract to Vegas Rock & Sand Co., Las Vegas, Nevada. [21]

Article XXI (a) Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

If this Subcontract is in excess of one hundred thousand dollars, (\$100,000.00), the Subcontractor agrees to renegotiate his contract prices pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Public Law 528.

(a) At such period or periods when, in the judgment of the Secretary of War, the profits accruing to the contractor under this contract can be determined with reasonable certainty, the Secretary of

War and the contractor, upon the written demand of the Secretary of War, will renegotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

(b) In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall be retained by the Government or repaid to the Government by the contractor, as directed by the Secretary of War.

(c) Each Fixed-priced or lump sum subcontract in an amount in excess of \$100,000.00 entered into by the contractor hereunder shall include the following provisions:

1—At such period or periods when, in the judgment of the Secretary of War, the profits accruing to the Subcontractor under this contract can be determined with reasonable certainty, the Secretary of War and the Subcontractor, upon the written demand of the Secretary of War, will renegotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

2—In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall, as directed by the Secretary of War,

(A) Be deducted by the Contractor from payments to the Subcontractor under this contract; or

(B) Be paid by the Subcontractor directly to the Government; or

(C) Be repaid by the Subcontractor to the Contractor.

3—The Subcontractor agrees that the Contractor shall not be liable to the Subcontractor for or on any amount repaid to the Contractor or paid to the Government by the Subcontractor or deducted by the Contractor from payments under this contract, pursuant to directions from the Secretary of War in accordance with the provisions of this Article. Under its contract with the Government all amounts repaid by or withheld from the Subcontractor hereunder.

4—The term “Secretary of War” as used herein includes his duly authorized representatives.

(d) If any renegotiation between the Secretary of War and any Subcontractor pursuant to the provisions required by paragraph (c) hereof results in a reduction of the contract price of the subcontract, the Government shall retain from payments to the Contractor under this contract, or the Contractor shall repay to the Government, as the Secretary of War may direct, the amount of such reduction, less any amounts paid thereon by the Subcontractor directly to the Government.

(e) The term “Secretary of War” as used herein includes his duly authorized representatives. [22]

Article XXII. Bond Provision.

Duque & Frazzini to furnish 100% Combination Bond (labor, material, and performance). Basich Brothers Construction Co. will pay for said bond.

Article XXIII. Schedule of Subcontract Unit Prices With Approximate Quantities and Amounts.

Item	Approximate Quality	Unit	Description	Unit Price	Approximate Amount
9	15,300	c.y.	Gravel embankment. Gravel embankment shall be put in bin by second party and hauled away by first party. Any over-production that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Engineers fill measurement to be used to govern quantities.	.46	7,038.00
11	9,000	c.y.	Gravel for stabilized sub-grade under gravel base course. Gravel shall be put in bin by second party and hauled away by first party. Any overproduction that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Measurement to be computed on truck water level.	.40	3,600.00
15	42,530	c.y.	Gravel for base course. Gravel shall be put in bin by second party and hauled away by first party. Any overproduction that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Engineers fill measurement to be used to govern quantities.	.46	

Item	Approximate Quality	Unit	Description	Unit Price	Approximate Amount
21	49,600	c.y.	Rock and sand for 18"-12"-18" Portland cement concrete airfield pavement. Rock and sand shall be put in stockpile by second party and rehandled by first party. Engineers measurement for concrete will be used to govern quantities.	1.05	
22	6,320	c.y.	Rock and sand for 10" Portland cement concrete airfield pavement. Rock and sand shall be put in stockpile by second party and rehandled by first party. Engineers measurement for concrete will be used to govern quantities.	1.05	
26A	8,535	tons	Rock and sand for binder course asphaltic concrete Class 1.	.65	
26B	11,200	tons	Rock and sand for wearing course asphaltic concrete Class 2.	.65	
			Rock and sand for Items 26A and 26B, shall be put in stockpile by second party and rehandled by first party. Engineers weights for various classes of asphalt concrete will be used to govern quantities; however, oil used is to be removed first before tonnage computed.		

Article XXIV. Damages for Delay in Completion.

If the Subcontractor shall fail to complete the said work within the time and in the manner speci-

fied, or within the time of such extensions as may be granted, he shall forfeit and pay to the Contractor the sum of the amount assessed by U. S. Engineer Office, per day for each calendar day that he is in default according to the terms hereof, which sum the Contractor shall retain as liquidated damages.

Article XXV.

It is mutually agreed that time is of the essence of this agreement, and that it contains the whole and entire understanding of the parties hereto, and that it shall bind their heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said parties have hereunto set their hands the day and year above written.

BASICH BROS. CONSTRUCTION CO.,

By /s/ N. L. BASICH,

Party of the First Part.

DUQUE & FRAZZINI,

By /s/ CARSON FRAZZINI,

Party of the Second Part.

EXHIBIT "C"

Glens Falls Indemnity Company
Of Glens Falls, New York

SUB-CONTRACT BOND

Know All Men By These Presents, That we, Duque & Frazzini of Tonopah, Nevada (hereinafter called the Principal) as Principal and Glens Falls Indemnity Company, of Glens Falls, New York (hereinafter called the Surety) as Surety, are held and firmly bound unto Basich Brothers Construction Co., 600 S. Fremont, Ave., Alhambra, California (hereinafter called the Obligee) in the sum of One Hundred Thousand Seven Hundred Forty-five and 55/100 (\$107,745.55) Dollars, for the payment whereof said Principal and Surety bind themselves firmly by these presents.

Whereas, the Principal has entered into a written contract dated February 7th, 1945, with the Obligee for the construction of taxiways, warm-up and parking aprons, Job. No. Davis-Monthan ESA 210-6, 210-8 and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng. 1302, a copy of which is or may be hereto annexed.

Now, Therefore, the Condition of This Obligation Is Such, that if the Principal shall faithfully perform the work contracted to be performed under said contract, and shall pay, or cause to be paid in full, the claims of all persons performing labor upon or furnishing materials to be used in, or furnishing appliances, teams or power contributing to

such work, then this obligation shall be void; otherwise to remain in full force and effect.

This bond is executed for the purpose of complying with the laws of the State of Arizona, and shall inure to the benefit of any and all persons who perform labor or furnish materials to be used in, or furnish appliances, teams or power contributing to the work described in said contract, so as to give such persons a right of action to recover upon this bond in any suit brought to foreclose the liens provided for by the laws of the State of Arizona, or in a separate suit brought on this bond. No right of action shall accrue hereunder to or for the use of any person other than the Obligee except as such right of action may be given by the Mechanics' Lien Laws of the State of Arizona to persons performing labor or furnishing materials, appliances, teams or power as aforesaid. The total amount of the surety's liability under this bond, both to the Obligee and to persons furnishing labor or material, appliances, teams or power, shall in no event exceed the penalty hereof.

The Principal and Surety further agree to pay all just labor claims arising under said contract, within two (2) weeks after demand, and to waive the filing of lien claims or giving written notice required by Statute as a condition to bringing suit to enforce the same.

Provided, however, as to said Obligee, and upon the Express Conditions, the performance of each of

which shall be a condition precedent to any right of recovery hereon by said Obligee:

First: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by Registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owner, or his representative, or the [25] architect, if any, shall learn of such default; that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; shall also be subrogated to all the rights of the Principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

Second: That the Obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed; and shall also retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice of claims or claims of liens by persons performing work or furnishing materials under said contract

may be filed and until all such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments.

Third: That the Surety shall not be liable for any damages resulting from strikes, or labor difficulties, or from mobs, riots, fire, the elements, or acts of God, or for the repair or reconstruction of any work or materials damaged or destroyed by any such causes, nor for damages from injury to, or the death of, any persons, nor for the non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished, or the maintenance thereof, or repairs thereto, nor for the furnishing of any bond or obligation other than this instrument.

Signed, Sealed and Dated this 20th day of February, 1945.

DUQUE & FRAZZINI,
By CARSON FRAZZINI.

GLENS FALLS INDEMNITY
COMPANY,
By HARRY LEONARD,

Attorney.

(Corporate Seal.)

[Endorsed]: Filed Sept. 18, 1945. [26]

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Clifford R. McFall, plaintiff's attorney, whose address is 402 Valley National Bank Building, Tucson, Arizona, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

EDWARD W. SCRUGGS,

Clerk of Court.

By /s/ JEAN E. MICHAEL,

Deputy Clerk.

Date: September 18, 1945.

7-1615

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [27]

RETURN ON SERVICE OF WRIT

United States of America,
District of Arizona—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Basich Brothers Construction Co., a corporation, by delivering a copy of said Summons with Complaint attached, to which was attached Exhibits A, B, and C, to T. De Witt Talmage, Statutory Agent for said Cor-

poration for Pima County in the State of Arizona, and at the same time and place showing him the original Summons at 601 North Stone Avenue, Tucson, Arizona, in said District on the Nineteenth day of September, 1945, at 9:57 a.m.

Service, \$2.00; Travel, .06; total, \$2.06.

B. J. McKINNEY,

U. S. Marshal.

By /s/ EDMUND L. SCHWEPPE,
Deputy.

RETURN ON SERVICE OF WRIT

I hereby certify and return that on the 21st day of September, 1945, I received the within summons and served same on Hartford Accident and Indemnity Co., a corporation, by making substitute service upon the Arizona Corporation Commission and delivering to Wilson T. Wright, Chairman of Arizona Corporation Commission, copy of Summons to which was attached copy of Complaint and copy of Exhibits A, B, and C, and at the same time showing Mr. Wright the original Summons in his office in the Capitol Annex Building, Phoenix, at 10:45 AM on the 25th day of September, 1945.

Marshal's Fees: Travel, \$.20; Service, \$2.00; total \$2.20.

B. J. McKINNEY,

United States Marshal.

By M. CASSIE BAKER,

Deputy United States Marshal.

[Endorsed]: Filed Oct. 3, 1945. [30]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS BASICH BROTHERS CONSTRUCTION COMPANY AND HARTFORD ACCIDENT AND INDEMNITY COMPANY

Come now the above-named defendants, Basich Brothers Construction Company, a corporation, and Hartford Accident and Indemnity Company, a corporation, and, as and for answer to plaintiff's complaint on file herein, admit, allege and deny as follows:

I.

Admit the allegations of Paragraph I of said complaint with the exception of that portion thereof that "said use plaintiffs furnished labor and material in the prosecution of the work provided for in such contract, for which payment, although due, has not been made, as hereinafter more particularly set forth." [31] Defendants deny that said use plaintiffs furnished labor or material in the prosecution of said work but allege that any labor or material furnished by said use plaintiffs or any of them was for third parties in the production of material which said material was thereupon purchased by said defendant Basich Brothers Construction Company from said third parties and thereupon the material so purchased was used in the prosecution of said work. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that the alleged payment has not been made for the labor and material alleged to have

been furnished by said use plaintiffs and, basing their denial thereon they deny the same.

Admit all of the allegations of Paragraphs II, III, IV, V and VI of said complaint.

III.

Admit all of the allegations of paragraph VI of said complaint except as herein specifically denied. Deny that defendant Basich Brothers Construction Company employed Andrew Duque and Carson Frazzini as therein alleged but that said Andrew Duque and Carson Frazzini were independent contractors required to furnish said defendant with material as specified in the agreement attached to said complaint and marked "Exhibit B." Deny that said Andrew Duque and Carson Frazzini were to extract materials from certain pits designated by said defendant or that they were to perform their said contract with defendant under said defendant's direction or supervision. That the rights and obligations of the respective parties to said contract so marked "Exhibit B" are only those therein specifically set forth.

IV.

Defendants deny that the equipment alleged in Paragraph VIII of said complaint to have been rented by use plaintiff [32] Bert Turner, to Duque & Frazzini was used in the performance of work provided for in said contract with the United States Government therein referred. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations

set forth in said Paragraph VIII of said complaint except as herein otherwise alleged and basing their denial thereon they deny the same. Defendants admit the service of written notice within ninety days from June 8, 1945, as therein alleged.

V.

Defendants deny that the equipment alleged in Paragraph IX of said complaint to have been rented by use plaintiff, Frank E. Hinman, to Duque & Frazzini was used in the performance of work provided for in said contract with the United States government as therein alleged. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations set forth in said Paragraph IX of the complaint except as herein otherwise alleged and basing their denial thereon they deny the same. Defendants admit the service of written notice within ninety days from June 8, 1945, as therein alleged.

VI.

Defendants deny that the equipment alleged in Paragraph X of said complaint to have been rented by use plaintiff, Garland D. England, to Duque & Frazzini was used in the performance of work provided for in said contract with the United States Government as therein alleged. Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations set forth in said Paragraph X of said complaint except as herein otherwise alleged and basing their

denial thereon they deny the same. Defendants admit the service of written notice within ninety days from June 7, 1945, as [33] therein alleged.

For and as a Separate Defense to Each of the Causes of Action Alleged in the Complaint on File Herein, Defendants Allege:

I.

That the equipment alleged to have been furnished by each of the use plaintiffs in said action to said Duque & Frazzini, and any labor alleged to be performed by any of them were not supplied in the prosecution of the work provided for in said contract between defendant Basich Brothers Construction Company and the United States; that said Duque & Frazzini, although designated as subcontractor in said agreement attached to plaintiff's complaint and marked "Exhibit A," were merely material men and any equipment or labor alleged to have been furnished by any of said use plaintiffs were employed in the fabrication of material before said material was actually installed or became a part of said public improvement.

Wherefore, said defendants pray that plaintiff and said use plaintiffs take nothing as against these defendants or either of them and for their costs of court.

STEPHEN MONTELEONE,

Attorney for Defendants. [34]

State of California,
County of Los Angeles—ss.

N. L. Basich, being first duly sworn, deposes and says: That he is the President of the defendant Basich Brothers Construction Company, a corporation; that he has read the foregoing Answer and knows the contents and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes the same to be true.

N. L. BASICH.

Subscribed and sworn to before me this 5th day of October, 1945.

DOROTHY P. SOETH,
Notary Public in and for Said County and State.
My commission expires February 19, 1946.

Received copy of the within Answer this 10th day of October, 1945.

CLIFFORD R. McFALL,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 28, 1945. [35]

In the District Court of the United States
for the District of Arizona

No. Civil 320—Tucson

UNITED STATES OF AMERICA for the use of
BERT TURNER, FRANK C. HINMAN and
GARLAND D. ENGLAND,

Plaintiff,

vs.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants,

And Third-Party Plaintiffs,

vs.

GLENS FALLS INDEMNITY COMPANY OF
GLENS FALLS, NEW YORK, a corporation,

Third-Party Defendant.

ORDER UPON PRE-TRIAL CONFERENCE,
PURSUANT TO RULE 16

By direction of the Court a pre-trial conference was had in chambers, under and pursuant to Rule 16 of the Rules of Civil Procedure, on the 18th day of February, 1946, at which parties hereto were represented by their respective counsel as follows:

Mr. Clifford R. McFall and Mr. Joseph H. Riley for the plaintiff; Mr. Stephen Monteleone for the defendants and third-party plaintiffs, and Mr. Ralph

W. Bilby and Mr. John E. McCall for the third-party defendant;

As a result of which conference the following actions, amendments and stipulations and agreements were taken and made by the respective parties:

It was stipulated and agreed that Paragraph VII of the plaintiff's complaint be amended by interlineation by changing the word "contractor" in line 10 of said Paragraph to "subcontractor," and that the pleadings of the other parties hereto [36] stand to said complaint as amended;

That the respective amounts of the claims of the use plaintiffs, Bert Turner, Frank C. Hinman and Garland D. England, as set forth in the complaint, are correct, and that the nature of the claims are as stated in the complaint;

That a copy of the original contract referred to in Paragraph I of plaintiff's complaint now offered by plaintiffs and marked Plaintiff's Exhibit "A," may be received and marked in evidence with the same force and effect as though it were the original contract referred to.

That a copy of the Specifications referred to in the contract marked Plaintiff's Exhibit "A," now offered in evidence by the plaintiff and marked Plaintiff's Exhibit "B," may be received and marked in evidence as a part of said Contract, in lieu of the original Specifications, and with the same force and effect as though said specifications were the original above referred to.

That a copy of the Payment Bond referred to in

Paragraph V of the plaintiff's complaint now offered by plaintiff and marked Plaintiff's Exhibit "C," may be admitted and marked in evidence with the same force and effect as though it were the original Bond referred to.

That a copy of the Subcontract Agreement referred to in Paragraph VI of the plaintiff's complaint now offered by plaintiff and marked Plaintiff's Exhibit "D," may be admitted and marked in evidence with the same force and effect as though it were the original Subcontract Agreement above referred to, with the reservation on the part of counsel for the third-party defendant that the same is not material at this time.

That a copy of the Subcontract Bond referred to in Paragraph VII of plaintiff's complaint now offered by plaintiff and marked Plaintiff's Exhibit "E," may be admitted and marked in [37] evidence with the same force and effect as though it were the original Subcontract Bond above referred to, with the reservation on the part of counsel for the third-party defendant that the same is not material at this time.

Certain facts were stipulated, as appears from the Reporter's Transcript as follows:

"Mr. McFall: May it be further stipulated if the Court please, that the work to be done under the subcontract agreement between Basich Brothers and Duque and Frazzini, described in the subcontract as Item 9 Gravel Embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21

rock and Sand for 18"-12" 18" Portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement concrete airfield pavement, Item 26A rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2, are all set forth in the specifications, which are a part of the original contract in evidence in this case on pages 3 and 4 of the specifications, under Schedule of Work Items, and that the specifications and requirements for the doing of that work and the furnishing of that material are set forth in the specifications under the heading, 'Materials,' page III-2-3-4, of the specifications. As to items 9, 11, and 15, as set forth under the heading, 'Materials,' on pages III-2-3-4 of the specifications; and the requirements on the work as to items 21 and 22 are set forth on pages VI-5 of the specifications and that the requirements and specifications for the doing of the work under items 21 and 22 are set forth in the specifications under the heading 4-08, headed, 'Aggregate Grading Requirements,' on page IV-5 of the specifications; and that the requirements and specifications of the work to be done under items 26-a and b, are set forth in the specifications under the heading, 'Binder Course Asphaltic Concrete, Class 1 and Class 2, on pages VI-5 or schedule VI-5 of the specifications.

"Mr. Monteleone: The only exception I take, counsel uses the expression throughout, 'for doing the work.' Those requirements of the specifications are merely the requirements to be complied with in

producing the material to be used on the particular job. Counsel referred to the work in producing that material. I have no objection, but I don't want it to be understood that any work was directly done on the different projects, except as may be inferred from the contract itself." [38]

"Mr. McFall: That is a question of law.

"Mr. Monteleone: I understand that. I want it for the purpose of record. I don't want to prejudice any of my rights, when we say, 'the work to be done.' It is my contention all the way through, whatever work was done by use plaintiffs was work done in producing material, which had to meet the requirements set forth in the specifications. With that understanding, I will so stipulate.

"Mr. McFall: The point of this stipulation, Mr. Monteleone, is that the prime contract required certain materials to be prepared by the contractor according to definite specifications and requirements, and that those requirements are set out in the sub-contract and in the prime contract, in the specifications; and that so far as those items mentioned in the sub-contract are concerned, that Duque and Frazzini did do the work under and pursuant to the requirements of the prime contract.

"Mr. Monteleone: In the requirement of the prime contract, you mean.

"Mr. McFall: That is what I said.

"The Court: Is that stipulated to?

"Mr. Monteleone: Yes, with that understanding I have indicated.

"The Court: You are not objecting to it?

"Mr. Monteleone: No."

It was further stipulated as follows:

That all work done and all labor, materials, supplies and equipment furnished and provided by Andrew Duque and Carson Frazzini, a copartnership doing business under the name of Duque & Frazzini, referred to in Paragraph VI of plaintiff's complaint, in Pima County, Arizona, during the months of March, April, May and June, 1945, was done, performed, provided and/or supplied by said copartnership under the subcontract agreement referred to in said Paragraph VI of the plaintiff's complaint, a copy of which is attached to said complaint and marked Exhibit "B" and for the purposes and uses in said subcontract referred to and for or to no other purpose or use whatsoever.

That all of the work which Duque & Frazzini did pursuant to the Subcontract referred to in the complaint was done on premises [39] belonging to Stefan Gollob located approximately four and one-half miles from the base referred to in the contract as Davis-Monthan Field. That said premises were leased to the defendant, Basich Brothers Construction Co. by Stefan Gollob for the purpose of making available to said Basich Brothers Construction Co. the gravel, rock, and earth on the premises for use upon the work required of the defendant, Basich Brothers Construction Co., under the contract alleged in the complaint, and that the said defendant, Basich Brothers Construction Co., paid all rentals for the use of said premises for said purposes.

That said site was first selected by the United States Engineers before Basich Brothers Construction Co. could acquire the site from the owner for the purposes aforesaid.

That Basich Brothers Construction Co. actually paid for all labor as provided for in the instrument marked "Subcontract Agreement" referred to in the complaint;

That the amount involved in the Subcontract Agreement between Basich Brothers Construction Co., the defendant, and Duque & Frazzini, the subcontractors, exceeded the sum of \$100,000.00.

It was further agreed by respective counsel that the only issue remaining for determination by the Court under the plaintiff's complaint and the defendant's answer thereto is the question as to whether or not Duque & Frazzini were subcontractors within the meaning of the Miller Act, under which this suit is brought.

That subsequent to and during the trial proceedings it was stipulated in effect that Basich Brothers Construction Co. maintained and operated two plants on the Stefan Gollob premises above referred to as being under lease to Basich Brothers Construction Co., in connection with its work under the contract alleged in the complaint, one of which said plants was known as a batch plant and the other as a hot plant.

So Ordered this 4th day of March, 1946.

ALBERT M. SAMES,

District Judge. [40]

[Endorsed]: Filed March 4, 1946. [41]

In the District Court of the United States
for the District of Arizona

No. Civil 320 Tucson

UNITED STATES OF AMERICA for the use of
BERT TURNER, FRANK C. HINMAN and
GARLAND D. ENGLAND,

Plaintiff,

vs.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants,

JUDGMENT

This case came on regularly for trial before the Court sitting without jury on the 18th day of February, 1946. The parties appeared and were represented by their respective counsel as follows:

Mr. Clifford R. McFall and Mr. Joseph H. Riley for the plaintiff, and Mr. Stephen Monteleone for the defendants.

A pre-trial conference was had in chambers on said date under and pursuant to Rule 16 of the Rules of Civil Procedure, and the action, amendments and stipulations and agreements taken and made by the respective parties at said pre-trial conferences were recited in an Order heretofore duly made and entered herein.

On said date the case proceeded to trial and was tried upon the issues raised by plaintiff's complaint

herein and defendant's answer thereto not disposed of by admissions or agreement of counsel at the pre-trial conference, and at the conclusion of the trial the case was orally argued by respective counsel for the plaintiff and defendant and submitted for decision.

Whereupon, after due consideration of the record and the arguments and contentions of the respective parties, the Court on the 4th day of March, 1946, did render judgment in favor of the plaintiffs and against the defendants, Basich Brothers Construction [44] Company, a corporation, and Hartford Accident Indemnity Co., a corporation, as prayed for in plaintiff's complaint herein.

Wherefore, by virtue of the law and by reason of the premises aforesaid, It Is Ordered, Adjudged And Decreed:

That the use plaintiff, Bert Turner, do have and recover of and from the defendants, Basich Brothers Construction Co., a corporation, and Hartford Accident Indemnity Co., a corporation, the sum of \$2,404.63, with interest thereon at the rate of six percent per annum from date hereof until paid;

That the use plaintiff, Frank E. Hinman, do have and recover of and from the defendants, Basich Brothers Construction Co., a corporation, and Hartford Accident & Indemnity Co., a corporation, the sum of \$1,771.00, with interest thereon at the rate of six percent per annum from date hereof until paid;

That the use plaintiff, Garland D. England, do have and recover of and from the defendants, Basich Brothers Construction Co., a corporation, and Hartford Accident & Indemnity Co., a corporation, the sum of \$361.37, with interest thereon at the rate of six percent per annum from date hereof until paid;

And that the said use-plaintiffs recover of and from the said defendants their costs and disbursements incurred in this action amounting to the sum of \$38.96.

The Clerk is directed to enter judgment accordingly.

Done in open court this 20th day of March, 1946.

ALBERT M. SAMES

District Judge

Approved as to form:

STEPHEN MONTELEONE

Attorney for the Defendants

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

To Edward W. Scruggs, Clerk of the Above Entitled Court:

Notice Is Hereby Given that Basich Brothers Construction Co., a corporation, and Hartford Accident and Indemnity Company, a corporation, defendants above named, hereby appeal to the Circuit

Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about March 20, 1946.

Dated: April 10, 1946.

/s/ STEPHEN MONTELEONE

Attorney for Appellants, Basich Brothers Construction Co. and Hartford Accident and Indemnity Company.

[Endorsed]: Filed Apr. 16. 1946. [46]

In the United States District Court
for the District of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, for the use of Bert Turner, Frank E. Hinman, Garland D. England and Howard K. Cresswell, Plaintiff, vs. Basich Brothers Construction Co., a corporation, and Hartford Accident and Indemnity Company, a corporation, Defendants, numbered Civ-320 Tucson, on the docket of said Court.

I further certify that the attached pages, num-

bered 1 to 59, inclusive, contain a full, true and correct transcript of all the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Amended Designation of Contents of Record on Appeal, filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in the City of Tucson, State and District aforesaid, with the exception of the original exhibits referred to therein, pre-trial stipulation, and transcript of all the testimony.

I further certify that the originals of Plaintiff's Exhibits A, B, C, D, and E are transmitted herewith as a part of the Record on Appeal pursuant to Order of the Court dated May 16, 1946.

I further certify that the original Reporter's Transcript of Evidence and Proceedings is transmitted herewith and that the pre-trial stipulation designated by Appellants is contained therein. [60]

I further certify that the Clerk's fee for preparing and certifying to this said Transcript of Record amounts to \$24.20 and that said sum has been paid to me by counsel for the Appellant.

Witness my hand and the seal of said Court this 5th day of June, 1946.

[Seal] /s/ EDWARD W. SCRUGGS,
Clerk.

In the District Court of the United States
for the District of Arizona

Civil—No. 320—Tucson

UNITED STATES OF AMERICA for the use of
BERT TURNER, FRANK C. HINMAN and
GARLAND D. ENGLAND,

Plaintiff,

vs.

BASICH BROTHERS CONSTRUCTION CO., a
corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants

and Third-Party Plaintiffs,

vs.

GLENS FALLS INDEMNITY COMPANY OF
GLENS FALLS, NEW YORK, a corporation,
Third-Party Defendant.

Before The Honorable Albert M. Sames, Judge.
Tucson, Ariz., February 18, 1946.

TRANSCRIPT OF EVIDENCE AND PROCEEDINGS

Appearances: Mr. Clifford R. McFall and Mr. Joseph Riley, attorneys for plaintiff, United States of America for the use of Bert Turner, Frank C. Hinman and Garland D. England. Mr. Stephen Monteleone, for Basich Brothers Construction Co., a corporation, and Hartford Accident and Indemnity Co., a corporation, defendants. Mr. Ralph W.

Bilby and Mr. John E. McCall, attorneys for Glens Falls Indemnity Co., third-party defendant. [1*]

PRE-TRIAL STIPULATION

Mr. McFall: This is a pre-trial stipulation as to the facts, by and between respective counsel, and perhaps it will be best, Gentlemen, if we enter appearances for the record.

Mr. Monteleone: Stephen Monteleone, for Basich Brothers Construction Company, a corporation, and Hartford Accident and Indemnity Co., a corporation, defendants.

Mr. Bilby: Ralph W. Bilby and John E. McCall, attorneys for Glens Falls Indemnity Company of Glens Falls, New York, a corporation, third-party defendant.

Mr. McFall: Clifford R. McFall and Joseph Riley, attorneys for plaintiff, United States of Americal for the use of Bert Turner, Frank C. Hinman and Garland D. England.

Mr. McFall: You are willing to stipulate that the use plaintiff is entitled to recover against the Hartford Accident and Indemnity Co.?

Mr. Monteleone: That will be all right.

Mr. Bilby: Yes. You do not prejudice yourself one way or the other as against us.

The Court: That takes care, as far as the matter is concerned, against the construction company;

* Page numbering appearing at foot of page of original Reporter's Transcript.

part of the stipulation being that the amount of the claims as set forth by the three use plaintiffs is correct?

Mr. Monteleone: Correct, and the nature of the services, renting of equipment is correct.

Mr. McFall: Your Honor, I have a stipulation here, stated [2] between myself and Mr. Monteleone, which, under paragraph 2 provides; That the plaintiff may amend by interlineation, by changing the word "contractor" in line 10 of paragraph VII, to "sub-contractor."

The Court: Yes, I saw that.

Mr. McFall: May that be agreed to by all counsel?

Mr. Monteleone: No objection.

Mr. Bilby: We have no objection.

Mr. McFall: That it may be stipulated—I presume we should have these instruments marked.

The Court: All right, so you can identify them.

(Instruments marked Plaintiff's Exhibit A and Plaintiff's Exhibit B.)

PLAINTIFF'S EXHIBIT A CONTRACT FOR CONSTRUCTION

Contract No. W-02-353-Eng.-1302

This Contract, entered into this 25th day of January, 1945, by the United States of America (herein-

after called the Government) represented by the Contracting Officer executing this contract, and Basich Brothers Construction Co., a corporation organized and existing under the laws of the State of California, of the city of Alhambra, in the State of California (hereinafter called the Contractor), witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work—The contractor shall furnish the materials, and perform the work (except materials and equipment designated to be furnished by the Government) for constructing taxiways, warm-up and parking aprons, airfield lighting, drainage facilities, and water service lines, together with appurtenant facilities, Job No. Davis-Monthan ESA 210-6, 210-8, and 210-9, at Davis-Monthan Field, Tucson, Arizona, for the consideration of the schedule of payment hereto attached, and in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Invitation No. 45-79, dated 29 December 1944, Addendum No. 1, dated 4 January 1945, Addendum No. 2, dated 8 January 1945, Addendum No. 3, dated 12 January 1945, Addendum No. 4 dated 13 January 1945, Addendum No. 5, dated 17 January 1945, and drawings as listed therein.

The work shall be commenced on or before 26 January 1945, and shall be completed in accordance with paragraph SC-13 of the specifications.

PLAINTIFF'S EXHIBIT B

Invitation No. 45-79

29 December 1944

War Department

Specifications: For Taxiways, Warm-Up and Parking Aprons, Job No. Davis-Monthan ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tucson, Arizona.

Appropriation: 212150905 E.S.A., 1942-45.

Part I

STATEMENT OF WORK

1. Location. The building site of the work contemplated under these specifications is located at Davis-Monthan Field, Tucson, Arizona.

2. Work to be done.

(a) The work to be done consists of furnishing all necessary plant, equipment, labor, and materials (except materials and equipment designated to be furnished by the Government), and constructing therewith taxiways, warm-up and parking aprons, airfield lighting, drainage facilities, and water service lines, in accordance with the drawings listed in Part III, "Special Conditions," and with these specifications. The following principal items of work are included.

(1) Preliminary Operations.

(2) Earthwork.

(3) Gravel Base Course.

Exhibit B—(Continued)

- (4) Concrete Work.
- (5) Asphaltic Concrete.
- (6) Marking Taxiways.
- (7) Electrical Work.
- (8) Water Service Lines.
- (9) Drainage Facilities.
- (10) Miscellaneous Work and Job Clean-Up.

(b) Description of Work. All pavements and facilities shall be constructed and equipped in accordance with the detailed specifications and the drawings. In cases of conflict between the specifications and the detailed drawings, the specifications shall govern.

The contractor shall not operate his equipment over any existing mulched area except where absolutely necessary and then only when and where authorized by the Contracting Officer. All existing mulched or otherwise stabilized areas damaged as a result of the contractor's operations under this contract shall be restored by the contractor to their original condition at no cost to the Government.

(c) Sequence of Operations.

(1) General. The contractor will be required to perform construction operations in order of priority listed hereinafter. He shall complete all work in each priority before commencing work on the succeeding

Exhibit B—(Continued)

priority, except with written approval by the Contracting Officer.

(2) Schedule of Priorities.

(a) Priority No. 1 includes the warm-up pads on NW-SE Runway No. 1, fillets and warm-up aprons on N-S Runway No. 2, warm-up apron on east end of E-W Runway No. 3, paving around new hangar, and construction of the extension of Taxiway No. 10 to the Northwest.

(b) Priority No. 2 includes new parking apron adjacent to Runway No. 4, reconstruction of a portion of Taxiway No. 6 and Warm-Up Aprons on North end of Runway No. 4.

(c) Priority No. 3 includes the replacement of existing paving on west end of E-W anchorage.

3. Quantities.

(a) The total estimated quantities necessary to complete the work described in paragraph 2 are as follows:

Exhibit B—(Continued)

SCHEDULE OF WORK ITEMS

Item No.	Series No.	Designation	Approx. Quantity	Unit
1	301	Removal of Asphaltic Concrete Pavement.....	21,500	Sq. Yd.
2	301	Removal of 9-6-9 Portland Cement Concrete Pavement.....	750	Sq. Yd.
3	301	Removal of 36-inch Concrete Pipe.....	320	Lin. Ft.
4	301	Removal of Headwalls	Job	Lump Sum
5	301	Removal of Utilities in "Area m"	Job	Lump Sum
6	301	Removal of Miscellaneous Utilities	Job	Lump Sum
7	302	Clearing and Grubbing	67	Acre
8	339	Excavating and Grading	46,500	Cu. Yd.
9	339	Gravel Embankment	15,300	Cu. Yd.
10	339	Scarifying Native Earth Under Earth Fills or Gravel Embankment	133,900	Sq. Yd.
11	339	Stabilized Subgrade Under Gravel Base Course.....	154,900	Sq. Yd.
12	339	Rolling Subgrade, Earth Fill or Gravel Embankment with Smooth Roller	25,700	Square (100 Sq. Ft.)
13	339	Rolling Subgrade, Earth Fill or Gravel Embankment with Sheep's-Foot Roller	188,100	Square (100 Sq. Ft.)
14	339	Load Testing Stabilized Subgrade	14,000	Square (100 Sq. Ft.)
15	339	Gravel for Base Course	42,530	Cu. Yd.
16	339	Rolling Gravel Base Course with Smooth Roller.....	17,400	Square (100 Sq. Ft.)

Exhibit B—(Continued)

Schedule of Work Items—(Continued)

Item No.	Series No.	Designation	Approx. Quantity	Unit
17	339	Rolling Gravel Base Course with Sheep's-Foot Roller.....	154,800	Square (100 Sq. Ft.)
18	339	Load Testing Gravel Base Course	17,000	Square (100 Sq. Ft.)
19	339	Portland Cement	80,050	Bbl.
20	339	Membrane Curing Solution, Applied	7,200	Gal.
21	339	18-12-18-inch Portland Cement Concrete Airfield Pavement	48,830	Cu. Yd.
22	339	10-inch Portland Cement Concrete Airfield Pavement.....	5,075	Cu. Yd.
23	339	Dowels, Spacer Bars, Dowel Chairs for Types "B", "C", "D", "E-1", and "F" Joints, and Reinforcing Bars.....	180	Ton
24	339	Liquid Asphalt, Grade MC-1, Applied	540	Ton
25	339	85-100 Penetration Paving Asphalt	1,190	Ton
26	339	Asphaltic Concrete	19,810	Ton
27	339	Quick-Setting Emulsified Asphalt, Applied	115	Ton
28	339	Cover Aggregate for Seal-Coat, Applied.....	1,100	Ton
29	339	Painting 6-inch Reflective Type Yellow Taxiway Stripes.....	43	Station (100 Lin. Ft.)
30	339	Installing Delineators	80	Each
31	341	Electrical Work	Job	Lump Sum
32	323	8-inch Flexible Joint, Cast-Iron Water Piping.....	1,000	Lin. Ft.
33	323	6-inch Flexible Joint, Cast-Iron Water Piping.....	678	Lin. Ft.
34	323	8-inch Gate Valve and Type 2 Box	1	Each

Exhibit B—(Continued)

Schedule of Work Items—(Continued)

Item No.	Series No.	Designation	Approx. Quantity	Unit
35	323	6-inch Gate Valve and Type 2 Box.....	10	Each
36	323	Flush-Type Fire Hydrant	9	Each
37	323	Sterilization of Water Lines	Job	Lump Sum
38	305	18-inch Standard Strength Reinforced Concrete Pipe	680	Lin. Ft.
39	305	24-inch Standard Strength Reinforced Concrete Pipe.....	1,466	Lin. Ft.
40	305	30-inch Standard Strength Reinforced Concrete Pipe.....	663	Lin. Ft.
41	305	30-inch Extra Strength Reinforced Concrete Pipe.....	409	Lin. Ft.
42	305	36-inch Standard Strength Reinforced Concrete Pipe.....	615	Lin. Ft.
43	305	48-inch Standard Strength Reinforced Concrete Pipe.....	323	Lin. Ft.
44	305	48-inch Extra Strength Reinforced Concrete Pipe.....	777	Lin. Ft.
45	305	72-inch Standard Strength Reinforced Concrete Pipe.....	1,326	Lin. Ft.
46	305	72-inch Extra Strength Reinforced Concrete Pipe.....	406	Lin. Ft.
47	305	Concrete for Structures, Except in "Area k"	330	Cu. Yd.
48	305	Steel Reinforcement for Structures	4	Ton
49	305	Frames and Covers for Drainage, Structures, Except in "Area k"	19	Ton
50	305	Drainage Ditch Excavation	27,000	Cu. Yd.
51	305	Grader Ditches	960	Lin. Ft.
52	305	Interceptor Dyke Embankment	25,000	Cu. Yd.

Exhibit B—(Continued)

Schedule of Work Items—(Continued)

Item No.	Series No.	Designation	Approx. Quantity	Unit
53	305	Interceptor Ditch Excavation	26,800	Cu. Yd.
54	312	Reconstruction of Miscellaneous Structures in "Area k" Alternatives for Items Nos. 45, 46, 47, 48, 50, 52, and 53. (To be used in case Alternate Construction shown on Drawing File No. 1059/98 and noted on Drawings File Nos. 1059/46 and 47 is accepted.)	Job	Lump Sum
55	305	72-inch Standard Strength Reinforced Concrete Pipe.....	1,990	Lin. Ft.
56	305	72-inch Extra Strength Reinforced Concrete Pipe.....	610	Lin. Ft.
57	305	Concrete for Structures, Except in "Area k"	350	Cu. Yd.
58	305	Steel Reinforcement for Structures.....	4.5	Ton
59	305	Drainage Ditch Excavation	47,000	Cu. Yd.

(b) The above estimate is approximate and is given only to provide a basis for determining the amount of the consideration of the contract. Within the limit of available funds, the contractor will be required to perform the entire quantity of work necessary to complete the work specified in paragraph 2 hereof, be it more or less the amounts estimated above.

Exhibit B—(Continued)

4.08. Aggregate Grading Requirements:

PERCENT PASSING

Sieve Size	Primary Aggregate Sizes			Combined Course Aggregate			Combined Total Aggregate		
	1½"	¾"	No. 4	Sand	No. 4	No. 4	3"	1½"	¾"
	3"	1½"	¾"		3"	1½"	Max.	Max.	Max.
3"	100				100		100		
2½"	90-100				97-100		97-100		
1½"	0-10	90-100			50-70	95-100	67-79	96-100	
1"		0-10	90-100		22-40	35-55	43-58	58-74	95-100
¾"			20-45		6-16	10-22	30-44	40-55	55-71
No. 4			0-10		0-3	0-5	24-37	30-44	38-53
No. 8				95-100	75-90		20-32	25-38	31-45
No. 16				55-75			15-25	19-30	24-36
No. 30				30-55			9-17	11-20	15-25
No. 50				10-25			3-9	4-11	5-13
No. 100				2-8			0-3	0-4	0-5

Exhibit B—(Continued)

6-06. Bituminous Mixtures.

(a) Composition of Mixture. The mineral aggregate for the three classes of asphaltic concrete mixtures shall be of such grading that the respective percentages by weight as determined by laboratory sieves will conform to the gradations set forth hereinafter:

(1) Binder Course Asphaltic Concrete (Class 1)

Sieve Size	Percentage Passing Sieve Square Openings
1½ inch	100
1 inch	70 - 90
¾ inch	52 - 75
⅜ inch	32-- 52
No. 4 sieve	22 - 36
No. 10 sieve	16 - 26
No. 40 sieve	1 - 13
No. 80 sieve	3 - 8
No. 200 sieve	1 - 4
Percent by weight 85-100 penetra- tion asphalt (to be added to the aggregate	4.5 - 6.5

(2) Wearing Course Asphaltic Concrete (Class 2)

Sieve Size	Percentage Passing	
	1	2
¾ inch	100	100
1½ inch	76 -100	84 -100
⅜ inch	59 - 71	71 - 84
No. 4 sieve	35 - 54	54 - 73
No. 10 sieve	24 - 42	42 - 60
No. 40 sieve	10 - 23	23 - 36
No. 80 sieve	6 - 15	13 - 23
No. 200 sieve	3 - 8	4 - 9
Percent by weight 85-100 penetra- tion asphalt (to be added to the aggregate)	3.5 - 5.5	4 - 6

Exhibit B—(Continued)

(3) Wearing Course Asphaltic Concrete, Fine Grading (Class 3)

Sieve Size	Percentage Passing
$\frac{3}{8}$ inch	100
No. 4 sieve	65 - 80
No. 10 sieve	45 - 60
No. 40 sieve	25 - 55
No. 80 sieve	15 - 25
No. 200 sieve	5 - 9
Percentage by weight 85-100 penetration asphalt (to be added to the aggregate)	5.0 - 7.0

(c) Job Mix Formula. The contractor shall submit in writing the single definite percentage for each sieve fraction of aggregate, within the limits shown in subparagraph (a), which he chooses as a fixed mean in each instance, the percentage of paving asphalt for the mixture, and also the intended temperature of the completed mixture at the time it is discharged from the mixer. No work shall be started on the project nor any mixture accepted therefor until the contractor has submitted and received approval for his intended job mix formula. The job mix formula will be allowed the following tolerances:

Aggregate passing sieves No. 4 or larger.....	5%
Aggregate passing No. 10, No. 40, and No. 80 sieves	4%
Aggregate passing No. 200 sieve.....	2%
Asphalt	0.5%
Temperature of mixing	25°F.

The percentage of asphalt and gradation of aggregate, in the job mix formula, may be changed to meet specific field conditions without adjustment in contract costs, as directed by the Contracting Officer.

Mr. McFall: That the instrument marked Plaintiff's Exhibit A is the copy of the original contract referred to in paragraph I of the complaint, between Basich Brothers Construction Company and the United States of America, for the doing of the work described in the complaint, at Davis-Monthan Field, Tucson, Arizona; that this copy may be substituted and admitted in evidence in lieu of the original contract, in the same force and effect as though it is the same contract, subject, of course, to any errors which may appear, if there are any.

Mr. Monteleone: May I make this suggestion. Is it agreeable that the contract be marked for identification, with the understanding that counsel for any of the parties may read such portions of the contract which they may deem material to [3] the issues. In other words, there are a lot of foreign matter in the contract.

Mr. McFall: I don't see any objection to putting in the contract, Your Honor. I think we have alleged it. It is admitted and I have it.

The Court: The contract will come in in the course of the trial anyway.

Mr. McFall: We have no objection to the admission of the contract alleged in the complaint. Whatever is material to this case, we can point that out, but I think the whole contract should be in.

Mr. Monteleone: All right.

Mr. McFall: Plaintiff's Exhibit B, which are the

specifications referred to in the contract, marked Plaintiff's Exhibit A, and of course which are a part of the contract, which I also wish to offer in evidence in lieu of the original specifications, which I have here, which Mr. Monteleone brought over, with the understanding that Plaintiff's Exhibit B, being a copy, may be used and admitted in evidence to the same force and effect as though it were the original.

Mr. Monteleone: May this be understood. I don't know what the outcome of this case will be, nor does any other counsel; but if any of the parties become dissatisfied, Your Honor can visualize the size of the transcript, and in such event counsel can agree to the material portions and all other matters may be considered out of the record.

The Court: The portions that you want. [4]

Mr. McFall: You can only put in those things that are on appeal. But I think we should have the entire contract; while I certainly don't intend to refer to all of it, I think it should be in evidence.

The Court: Will you stipulate that?

Mr. Monteleone: I will stipulate that.

Mr. McFall: Further stipulate that the plans, which are also mentioned in the contract, and which I do not have, are not material to the consideration of this controversy, but only the detail drawings of the runways and things, which at the present time are not necessary to the determination of this case and none of those matters being in issue here and

for that reason may be omitted from the record. That the payment bond referred to, a copy of which I have in my hand, referred to in paragraph V of the complaint, may be admitted in evidence as part of this stipulation, marked Plaintiff's Exhibit C.

Mr. Monteleone: No objection.

(Such instrument being marked Plaintiff's Exhibit C.)

(Plaintiff's Exhibit C is similar to Exhibit "A" attached to Complaint and set out in full at pages 11, 12 and 13 of this Record.)

Mr. McFall: That the sub-contract agreement referred to in paragraph VI of the complaint, and a copy of which is attached to the complaint, may be admitted in evidence as a part of this stipulation, a copy of which sub-contract agreement I have in my hand, and may be marked Plaintiff's Exhibit D.

Mr. Monteleone: No objection. May it be understood by the third party defendant that these copies introduced by Mr. [5] McFall at the present time will be introduced in our matter as exhibits?

Mr. Bilby: If it becomes material, is that right, Mr. McCall?

Mr. McCall: That is right, if it becomes material.

Mr. McFall: That the sub-contract bond referred to in paragraph VII of plaintiff's complaint, and made a part of the complaint as Exhibit C, may be admitted in evidence under this stipulation and marked Plaintiff's Exhibit E.

(Said instruments being marked Plaintiff's Exhibit D and Plaintiff's Exhibit E.)

(Plaintiff's Exhibit D is similar to Exhibit "B" of Complaint and set out in full at pages 13 to 27, inc., of this Record.)

Plaintiff's Exhibit E is similar to Exhibit "C" of Complaint and set out in full at pages 28 to 31, inc., of this Record.)

Mr. Monteleone: No objection, with the same stipulation with third party defendant.

Mr. McFall: May it be further stipulated, if the Court please, that the work to be done under the sub-contract agreement between Basich Brothers and Duque and Frazzini, described in the sub-contract as Item 9 Gravel Embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and sand for 18" - 12" - 18" Portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2, are all set forth in the specifications, which are a part of the original contract in evidence in this case on pages 3 and 4 of the specifications, under Schedule of [6] Work Items, and that the specifications and requirements for the doing of that work and the furnishing of that material are set forth in the specifications under the heading,

"Materials," page III-2-3-4, of the specifications. As to items 9, 11, and 15, are set forth under the heading, "Materials," on pages III-2-3-4 of the specifications; and the requirements on the work as to items 21 and 22 are set forth on pages VI-5 of the specifications and that the requirements and specifications for the doing of the work under items 21 and 22 are set forth in the specifications under the heading 4-08, headed, "Aggregate Grading Requirements," on page IV-5 of the specifications; and that the requirements and specifications of the work to be done under items 26-a and b, are set forth in the specifications under the heading, "Binder Course Asphaltic Concrete, Class 1 and Class 2," on pages VI-5, or schedule VI-5 of the specifications.

Mr. Monteleone: The only exception I take, counsel uses the expression throughout, "for doing the work." Those requirements of the specifications are merely the requirements to be complied with in producing the material to be used on the particular job. Counsel referred to the work in producing that material. I have no objection, but I don't want it to be understood that any work was directly done on the different projects, except as may be inferred from the contract itself.

Mr. McFall: That is a question of law.

Mr. Monteleone: I understand that. I want it for the purpose of record. I don't want to prejudice any of my rights, [7] when we say, "the work to be done." It is my contention all the way through, whatever work was done by use plaintiffs was work

done in producing material, which had to meet the requirements set forth in the specifications. With that understanding, I will so stipulate.

Mr. McFall: The point of this stipulation, Mr. Monteleone, is that the prime contract required certain materials to be prepared by the contractor according to definite specifications and requirements, and that those requirements are set out in the sub-contract and in the prime contract, in the specifications; and that so far as those items mentioned in the sub-contract are concerned, that Duque and Frazzini did do the work under and pursuant to the requirements of the prime contract.

Mr. Monteleone: In the requirement of the prime contract, you mean.

Mr. McFall: That is what I said.

The Court: Is that stipulated to?

Mr. Monteleone: Yes, with that understanding I have indicated.

The Court: You are not objecting to it?

Mr. Monteleone: No.

Mr. McFall: We already have a stipulation which I will read into this record. This is contained in paragraph 3 of the stipulation between myself and Mr. Monteleone, filed February 15, 1946, as follows: That all work done and all labor, materials, supplies and equipment furnished and provided by Andrew Duque and Carson Frazzini, a copartnership doing business [8] under the name of

Duque & Frazzini, referred to in Paragraph VI of plaintiff's complaint, in Pima County, Arizona, during the months of March, April, May and June, 1945, was done, performed, provided and/or supplied by said copartnership under the sub-contract agreement referred to in said Paragraph VI of plaintiff's complaint, a copy of which is attached to said complaint and marked Exhibit B and for the purposes and uses in said sub-contract referred to and for or to no other purpose or use whatsoever.

Mr. Monteleone: I have the assurance of counsel that is a true fact. I so stipulate. I don't think counsel will have any objection to that stipulation. That is an established fact.

Mr. McFall: It is stipulated also, as I understand it—I am trying to follow my complaint through here, your Honor—that the statement of the claim of Bert Turner, set forth in paragraph VIII of the complaint, for the sum, total sum of \$2404.63, is a correct statement of the amount of his charge for rental of his trucks to Duque and Frazzini, as alleged in paragraph VIII of the complaint; and that that equipment was used by Duque & Frazzini in the work required by and under said sub-contract agreement.

Mr. Monteleone: We so agree. That is admitted in the pleading.

Mr. McFall: All except the amount.

Mr. Monteleone: We have agreed previously as to the amount.

Mr. McFall: I just wanted to get it definite. Then the [9] same stipulation may be made and understood in regard to the use plaintiff Frank E. Hinman; that the correct amount of his claim is \$1771, otherwise the same stipulation can be made regarding him, as regarding the character of the services, as was made in the case of Bert Turner; that the amount of the claim of Garland D. England, in the sum of \$361.37, is a correct statement of the amount of work, equipment, labor, or material which he furnished to Duque & Frazzini, and that consisted of truck rental, and that they were used for the same purposes and same reasons I have heretofore stipulated.

May it further be stipulated that all of the work which Duque & Frazzini did pursuant to the subcontract was done upon the premises, in the vicinity of the base referred to as Davis-Monthan Field.

Mr. Monteleone: Approximately $4\frac{1}{2}$ miles from the base.

Mr. McFall: Approximately $4\frac{1}{2}$ miles from the base. These premises, the lease of the premises was from Stefan Gollub, and that Stefan Gollub leased said premises for the purpose of making available to Basich Brothers the gravel, rock and earth on the premises, for use upon the work required by this company on Davis-Monthan Field; and that Basich Brothers paid Stefan Gollub, the lessor, rental for the said premises.

Mr. Monteleone: That is indicated in the con-

tract. But I want to add a further stipulation, that the site from which the material was to have been produced was first selected by the U. S. Engineer, who had to make a test. In other words, the material had to be available to the job and it had to meet the [10] requirements of the U. S. Engineer Department before Basich Brothers could acquire the site from the owner. Is that understood?

Mr. McFall: That is understood, but that the premises were the leased premises of Basich Brothers. I mean, it was under lease to Basich Brothers and that Duque & Frazzini were merely there on Basich Brothers' premises in doing his work.

Mr. Monteleone: That is correct. That is indicated in the contract.

Mr. McFall: May it further be stipulated, in accordance with the sub-contract, attached to the contract, that Basich Brothers actually paid all of the labor, all of Duque & Frazzini's labor which was done in performance of the work designated by them.

Mr. Monteleone: It will be stipulated that Basich Brothers made payments, labor payments, as provided for in the instrument designated as a sub-contract, between Duque & Frazzini and Basich Brothers Construction Company.

Mr. McFall: That the defendant, Basich Brothers, at all times had their General Superintendent upon the premises and being operated by Duque & Frazzini.

Mr. Monteleone: No, I understand that is not a fact, that they had gone there on occasion, but——

Mr. McFall: Furthermore, on occasion they gave directions as to how the work should be done and when it should be done.

Mr. Monteleone: No, that is not a fact, as I understand it. [11]

Mr. McFall: Furthermore, that Basich Brothers at all times held out Duque & Frazzini not only to these plaintiffs, but to the public as sub-contractors.

Mr. Monteleone: That is not stipulated to.

Mr. McFall: That is all, I think all right now.

The Court: Is that all in connection with the stipulation? Is there anything else to be incorporated in the stipulation?

Mr. McFall: I will have to put on evidence as to matters on which we disagree. Practically all of these matters are admitted, but those are all of the facts which we will require to present to the Court.

The Court: Is there any further stipulation that counsel want to make?

Mr. Monteleone: I am afraid, as far as third party plaintiffs are concerned, we will have to fight it out.

The Court: That is about the attitude of counsel for Glens Falls Indemnity Company?

Mr. Bilby: That is right. I don't know what

we can stipulate. If Mr. McFall wanted to stipulate to any judgment, we would not question the amount.

Mr. McFall: Will it be further stipulated that the amount involved in the Duque & Frazzini sub-contract exceeded \$100,000?

Mr. Monteleone: That is correct.

Mr. Bilby: So to make it come under the Miller Act?

Mr. McFall: No, it goes to the question of estoppel. [12] They have pleaded that in the motion and I say therefore, they are estopped to deny they are sub-contractors.

Mr. Monteleone: When I stipulate to the amount, if the Court please, the quantities and the prices set forth in the contract, I think that it exceeds counsel when he says I stipulate the amount set forth in the contract itself.

The Court: So there is no occasion for further stipulation. All right, shall we go out and go ahead with the case. There are no other stipulations now between counsel?

Mr. Monteleone: Except, counsel, as I understand, will you stipulate as to certain letters sent to the Glens Falls Indemnity Company?

Mr. Bilby: I think the simplest way to handle that will be to present them to us.

Mr. McCall: Each one as it comes up.

Mr. McFall: There is one other matter here, if

the Court please, that I would like to submit to counsel in the form of a stipulation and it pertains to the claim of Howard Cressell. I submitted a stipulation to Mr. Cressell, whom I represented all along, but he didn't get it in time. I filed the original complaint; it is exactly identical in substance and effect, for the claims for truck rental, which are already in the case. I have prepared an amendment, and we wondered if counsel would permit me to include that my claims be amended at this time and stipulate the correctness of it, the same stipulation as to the other claimants, so that I won't have to file a separate [13] suit for Mr. Cressell later on.

Mr. Monteleone: I explained my position to counsel previously, if the Court please, and I talked to Mr. McCall, and I couldn't get a satisfactory stipulation which would justify me to enter into a written stipulation; and at this time I feel somewhat reluctant to enter into a stipulation. But after this case is determined we may come to some satisfactory arrangement, but in view of the attitude for third party plaintiffs, I wouldn't want to do it.

Mr. McFall: Very well, your Honor.

The Court: Very well, we will proceed.

(Parties and counsel adjourn to court room.)

The Court: You have some further testimony you desire to present at this time, Mr. McFall?

Mr. McFall: Yes. Mr. Hampton.

CLARENCE HAMPTON,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. McFall:

Q. Will you talk loud enough so His Honor can hear this. What is your name?

A. Clarence Hampton.

Q. Do you live in Arizona? A. I do. [14]

Q. Where?

A. Gila Bend is my home address.

Q. What is your business?

A. I am what is termed at the pit as a crusher operator, or pit foreman, or superintendent of pits and dirt production.

Q. Were you employed in June to do that work here by Duque & Frazzini, in connection with what is known in this case as Davis-Monthan Field job?

A. I was.

Q. And you worked for Duque & Frazzini, did you? A. Yes.

Q. Where did you work, out Stefan Gollub's place? A. That is right.

Q. What was your position with Duque & Frazzini? A. I didn't get that.

Q. What was your position on that job?

A. My position there was general superintendent of the pit and production of the materials.

Q. You were Duque and Frazzini's general superintendent? A. That is right.

(Testimony of Clarence Hampton.)

Q. Were you there from the beginning of the job to the end of it, so far as Duque & Frazzini's part of it was concerned? A. That is right.

Q. That took in April, May and part of June, 1945? A. That is right.

Q. I ask you whether or not Basich Brothers Construction [15] Company had anyone on that job at the particular place where you were working?

Mr. Monteleone: I object to that, unless this man knows who the party was and whether he was authorized by the corporation. This is a corporation, authorized to be on the job. I don't think this man is in a position to testify to that fact.

Mr. McFall: I can't show it all at once, your Honor.

The Court: Proceed.

Mr. McFall: Q. Did you know the superintendent of Basich Brothers Construction Company?

A. I did.

Q. What was his name?

A. George Covicks. That is the way I would pronounce it.

Q. Was he out there during the course of this work? A. He was.

Q. Was he acting at all times as superintendent of Basich Brothers Construction Company?

Mr. Monteleone: I object to that. This man is not qualified to answer that question.

Mr. McFall: He can state that he did so act, your Honor, as superintendent of the job.

(Testimony of Clarence Hampton.)

The Court: The witness may answer the question. Go ahead.

A. He did.

Q. (By Mr. McFall): Did he give you, or the men working for Duque & Frazzini, orders as to how the work should be done [16] on occasions there?

A. There was one time on a controversy that he did override me on Duque & Frazzini's orders.

Q. When was that?

A. That was on a Saturday noon, that I had instructions to close the plants down, and I did so.

Q. On a Saturday afternoon?

A. On Saturday at 11 o'clock to be exact, and the reason for that——

Mr. Monteleone: I object to what the reason was.

The Court: Just answer the question.

Mr. McFall: Q. Go ahead, you ordered the plant closed. What did he do?

A. He came down to another representative that I had, notifying him, and authorized the work to go ahead; and I told him at the time that I had instructions, as far as Duque & Frazzini were concerned that I would be liable for that, and he gave the remark that the job had to go on.

Q. Did it go on?

A. It went on the rest of that shift.

Q. Did you stay there and superintend it?

A. I did not.

Q. Did he? A. I suppose he did.

(Testimony of Clarence Hampton.)

Q. How often did you see him around there on this work? Was he there every day?

A. I don't suppose there was a day that he wasn't there [17] during the day and more sometimes.

Q. What did he do?

A. He acted as general superintendent, I would consider the man, in seeing that the job was being done.

Q. Did he inspect the work?

A. To an extent, yes. The government had other inspectors there, as far as inspectors were concerned, but he was in general supervision of it, I would term the man, and regarded him that way.

Q. This material that was produced by Duque & Frazzini there on Stefan Gollub's place, was all delivered to Basich Brothers, Mr. Hampton, by Duque & Frazzini? A. Yes, sir.

Q. They sent their truckers there to get the material as it was produced? A. They did.

Q. Basich Brothers also paid all of his common labor?

Mr. Monteleone: Just a minute. I object to that, if the Court please, whether Basich Brothers paid the account, unless the man knows.

Mr. McFall: I didn't say the account.

Mr. Monteleone: What?

Mr. McFall: I said the common labor.

Mr. Monteleone: I object unless he knows.

Mr. McFall: Q. Do you know whether or not the labor under your charge and supervision re-

ceived their weekly [18] payments from Duque & Frazzini or Basich Brothers?

Mr. Monteleone: The contract speaks for itself. The contract makes certain provision as to what Basich Brothers should do, and one of those provisions is they should pay the labor bill.

Mr. McFall: We want to show they did.

The Court: Objection overruled. Answer the question.

The Witness: Answer the question?

Mr. McFall: Yes.

A. They did.

Mr. McFall: I think that is all.

Cross Examination

By Mr. Monteleone:

Q. Did you know Mr. Williams on that job?

A. I did.

Q. On this date you say Duque & Frazzini shut down the plant, that was sometime in June, wasn't it?

A. No, sir. It was getting along toward the last of their job. I disrecall the date.

Q. At that time, Mr. Williams was along also, wasn't he?

A. I don't believe he was at just the time.

Q. Did he come there later on?

A. There was a probability he did.

Q. At that time, Mr. Williams instructed you that the work must progress in order that it wouldn't hinder the operations at the Base? [19]

A. Not to me directly.

(Testimony of Clarence Hampton.)

Q. Did you hear him say that to Duque & Frazzini? A. I did not.

Q. But you were told not to close down that plant, weren't you?

A. Just that the plant was going to operate.

Q. What was that?

A. Mr. Covick said the plant was going to operate.

Q. In other words, he told you if it didn't operate he would have to suspend operations at the main base?

A. He didn't go into detail with me.

Q. That was the only occasion he told you about continuing with your operation, isn't that so?

A. That one time.

Q. As a matter of fact, when Mr. Williams came over to the job, the U. S. engineer came over to the particular job where you were working, he was concerned about the quality of the material that Duque & Frazzini were producing, isn't that true?

A. To some extent.

Q. Yes, and whatever complaint was made by Mr. Williams, U. S. engineer on the job, was the fact that some of the materials weren't complying with government specifications, isn't that true?

A. He claimed so, but he shouldn't have accepted it if he didn't want it.

Q. But that was his main objection, that the material wasn't coming up to specifications?

A. I don't think so, your Honor. [20]

(Testimony of Clarence Hampton.)

Q. When Mr. Williams came over there what did he complain about?

A. The only complaint I heard was completing the job. The quality of the material wasn't brought into question so much.

Q. In other words, the job was being somewhat delayed wasn't it? A. That is right.

Q. That was the only complaint that was made by Covick or the only complaint made by Mr. Williams, was to complete that job, isn't that true?

A. That is right.

Q. That was the only directions given to you by either of these parties, was to complete this job?

A. That is right.

Q. Because the government was aiming to get that bomber base completed as soon as possible, isn't that true? A. That is right.

Q. Now all of the material that Duque & Frazzini were producing at this particular pit either was placed at stock pile and then dumped in trucks, isn't that true, and hauled to the main base?

A. That is right.

Q. And that main base was located about 4½ miles from that pit, isn't that true?

A. Presumably so.

Q. You were getting all of your directions from Duque & [21] Frazzini in producing the material?

A. That is right.

Q. You were producing gravel, rock and sand?

A. That is right.

Q. And the gravel, rock and sand produced by

(Testimony of Clarence Hampton.)

Duque & Frazzini had to come up to certain specifications by the government, isn't that true?

A. That is right.

Mr. Monteleone: That is all.

Redirect Examination

By Mr. McFall:

Q. But Covick did direct your men to proceed with the work on that Saturday afternoon, and they did so, is that right? A. That is right.

Mr. McFall: That is all.

LEE WARD,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. McFall:

Q. Where do you live, Mr. Ward?

A. 30th and Park.

Q. Tucson, Arizona? A. Yes, sir. [22]

Q. How long have you lived here?

A. Since last March.

Q. Did you work here in connection with the contract known as Duque & Frazzini contract with Basich Brothers? A. Yes, sir.

Q. What was the nature of your work there?

A. Crusher operator, mechanical work.

Q. How long have you been in that work, Mr. Ward? A. 30 years.

(Testimony of Lee Ward.)

Q. Who were you working for before you went to work on this job here?

A. Basich Brothers.

Q. How-long had you been working for Basich Brothers? A. About two years.

Q. Where did you live before you came here for this job?

A. I was in the northern part of the state, Flagstaff. We finished a job at Flagstaff.

Q. Basich Brothers' job there?

A. Yes, sir.

Q. Where did you live at that time?

A. My headquarters was always in Flagstaff, but I worked different times in California and Nevada.

Q. Who directed you to come down here?

A. Basich Brothers' superintendent.

Q. Did they pay you while you were here?

A. Sure. [23]

Q. And you were operating a Duque & Frazzini crusher?

A. It was Basich Brothers' crusher, they rented it and I worked for them.

Q. When did you quit working here for Duque & Frazzini?

A. I don't know just exactly what time it was; whenever they pulled out.

Q. June?

A. Something like that, I don't know.

Q. Did you continue working for Basich Brothers? A. I did.

(Testimony of Lee Ward.)

Q. How long?

A. Until they finished the job and we moved the stuff away.

Q. When was that?

A. October 8th, when I sat out the last load.

Q. In other words, you were working for Basich Brothers before you came down here?

A. Sure.

Q. They paid you while you were here to operate this crusher for Duque & Frazzini?

A. That is right.

Q. And you continued working for them after Duque & Frazzini left?

A. That is right.

Mr. McFall: That is all.

Cross Examination

By Mr. Monteleone:

Q. You were to get your directions from the gentleman, [24] Mr. Hampton?

A. I got them from Hampton and Duque & Frazzini.

Q. And you were operating a crusher Duque & Frazzini were renting from Basich Brothers?

A. That is right.

Mr. Monteleone: That is all.

BERT TURNER,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. McFall:

Q. Please state your name.

A. Bert Turner.

Q. Are you one of the claimants in the case on trial?

A. Yes, sir.

Q. And you have a claim here in this case for the sum of \$2400?

A. Yes, sir.

Q. And consists—I believe it has been stipulated—of rental of your trucks to Duque & Frazzini on the Davis-Monthan job?

A. Yes, sir.

Q. Mr. Turner, I will ask you whether or not you knew the relationship of Duque & Frazzini with Basich Brothers at the time you entered into this agreement with Duque & Frazzini? [25]

A. They both told me they were sub-contractors of Basich Brothers.

Q. Who do you mean by both?

A. Duque and Mr. Frazzini.

Mr. Monteleone: If the Court please, I move that the answer be stricken out as hearsay, as far as Basich Brothers is concerned.

Mr. McFall: I don't believe so, your Honor. It goes to a question of estoppel. Basich Brothers, by the very terms of their contract, say they are sub-contracting this work. The public generally understood they were sub-contractors; this man so understood. Now they want to come in and say they weren't sub-contractors. They want to say something else. I think that is the purpose of this testimony, to show this man, in the contracting of

(Testimony of Bert Turner.)

this job, by virtue of the Miller Act; and by virtue of the Act they were sub-contractors.

Mr. Monteleone: Are you trying to hold Basich Brothers liable here under the Miller Act, Mr. McFall?

The Court: He may answer.

Mr. Monteleone: I note an exception, if the Court please.

Q. (Mr. McFall): It is notoriously understood they are sub-contractors of Basich Brothers?

Mr. Monteleone: I object to the question, "they are notoriously known——"

The Court: Answer the question.

A. Absolutely was. I wouldn't work for an outfit I didn't [26] know they were bonded and had a sub-contract of that kind. They both told me they were sub-contractors of Basich Brothers.

Cross Examination

By Mr. Monteleone:

Q. When you say they both, you are talking about Duque & Frazzini?

A. That is right.

Redirect Examination

By Mr. McFall:

Q. They told you they had a sub-contract with Basich Brothers? A. Yes, sir, they did.

Mr. McFall: I think that is all I have, your Honor. I submit the plaintiff's case on that testimony.

(Testimony of Bert Turner.)

The Court: Does counsel desire to submit some testimony at this time?

Mr. Monteleone: Not as far as use plaintiff's case is concerned. As I indicated to the Court, these facts are preliminarily agreed upon. It is a legal question, nothing more or less. I don't desire to introduce any evidence, but I do desire to argue the matter, cite some authorities for the Court in connection with the legal matter.

The Court: I think it would be wise to submit that matter at this time.

(Arguments.) [27]

Mr. McFall: If the Court please, in the pre-trial conference this morning I am not sure whether this complaint was put into the record or not, but at any rate, I overlooked the matter if it was not, and if it is not I desire at this time to offer the complaint filed, the verified complaint filed by Basich Brothers Construction Company, by N. L. Basich, president, in the U. S. District Court for the District of California, which is a suit by them against Glens Falls, on this identical sub-contract and sub-contract bond, for the purpose of showing the construction placed on this contract by this defendant in that action as plaintiff; and if the Court will examine it, particularly the paragraphs which I can point out to you, I think the materiality of it—

Mr. Monteleone: Counsel, I am not going to stipulate the complaint is material to any of the issues involved here, except the Court may con-

(Testimony of Bert Turner.)

sider any allegations in the complaint as admissions or statements——

The Court: That is the purpose of the statement by the defendant; for no other reason. That action is entirely different from this action here. In that action the construction company is suing Glens Falls directly for a loss which they directly sustain.

Mr. McFall: The suit is upon this sub-contract, and——

The Court: You mean Duque & Frazzini?

Mr. McFall: Yes, your Honor. This is a suit against Duque & Frazzini and their bondsmen on this contract, showing [28] beyond any shadow of a doubt that this party, Basich, regards this as a sub-contract in that suit over there, and alleges that the material was furnished by and work was done in this prime contract by Duque & Frazzini. I should like to offer it for that purpose, and refer to it in my argument.

The Court: And you want it limited to what, Mr. Counsel?

Mr. Monteleone: I will not agree that that complaint is material to the issues involved in this matter. The only purpose it may serve—I don't see how it can change the terms of the contract itself. If the parties refer to the contract as a sub-contract, that doesn't place the construction that the Court is called upon to place on it. What the defendant may have called that after this litigation took place is not going to add to or detract

(Testimony of Bert Turner.)

from the words or provisions of the contract itself. In other words, the Court is bound not by what the parties may call the instrument, but by what interpretation the Court places on the instrument itself. I understand counsel's purpose in introducing it is merely to indicate what the defendant, Basich Brothers, call that in their complaint, the contract referred to as a sub-contract. For that purpose alone I have no objection.

The Court: Well, I noticed this morning in your discussion of the McAvoy case, to the relationship that the statutes recognize between these parties. I suppose you are offering this complaint now as to what bearing it may have in that relationship. [29]

Mr. McFall: Yes, your Honor. Not only do they call them a sub-contractor, but they go farther than that, which coincides with our theory that it wasn't a contract to furnish material, but to do work; and that is what they say all through this complaint here. I do not think they can go into one court and say that, and come into another court and say it is only a material man's contract.

The Court: The ruling will be that it is admitted. It is up to the Court to fix the limitations as to how far it should be considered in any issues in this case.

The Clerk: Plaintiff's Exhibit F in the record.

(Arguments.)

Mr. McFall: May I address the Court and Counsel in regard to one matter in the stipulation. My attention was called to it by Mr. Monteleone's

last argument. I ask now if counsel for Basich Brothers Construction Company, and Hartford Accident and Indemnity Company, will stipulate that it is a fact that Basich Brothers were operating plants on the Gollub premises at or near the plants operated by Duque & Frazzini in preparing the material to be put on the Base, to-wit, a batch plant and a hot plant, one for the preparation of Portland cement base and the other for asphalt concrete?

Mr. Monteleone: We are getting into a new issue.

Mr. McFall: No, we are not. He has brought out the question that this is four and one-half miles from the Base and how could they be working on the Base when it was four [30] and one-half miles away. We were attempting to show that Basich's superintendent was there all the time. The truth of the matter is, they were operating plants there side by side on this plot of ground they had leased. They were making some of this material they were putting in those very plants; they were operating it side by side. Counsel contends that Basich Brothers weren't doing work on that material, because he was four and one-half miles from the Base. That is the argument he makes about us. We want to show that Basich was operating there alongside us, in this same pit, making this stuff, cement and asphalt, to be put on the base. He was accepting some delivery of our material right there on the Gollub premises.

The Court: The plaintiffs were using Duque &

Frazzini's teams and equipment, trucks, so many days—but at that point, the materials were being prepared and produced for utilizing by Duque & Frazzini?

Mr. McFall: Yes. And right there at the same place, Basich Brothers were conducting the same operation as part of their work under this prime contract, right there beside us on the Gollub property. They say this isn't true, that all this material was delivered at stock pile. It was done right there by Basich, not by us, but by Basich Brothers.

Mr. Monteleone: I don't see where that has any materiality, if the Court please.

Mr. McFall: It is in answer to his argument that because the plant was four and one-half miles away we couldn't [31] do the work. If he could do the work there, we could do it there. Certainly he wasn't furnishing the material.

Mr. Monteleone: I won't stipulate to that.

Mr. McFall: Very well, I want to call one witness.

The Court: All right.

Mr. Monteleone: If the Court please, Mr. Basich states that they had an asphalt plant nearby, and that they did take material that was in stock pile, that was produced by Duque & Frazzini and haul it to their asphalt plant and use some of the material in the asphalt plant and batch plant for concrete.

Mr. McFall: There was a batch plant and hot plant.

Mr. Monteleone: That is right.

(Testimony of Bert Turner.)

Mr. McFall: Operated there on the Gollub premises by Basich Brothers.

Mr. Monteleone: That is right. That had nothing to do with the Duque & Frazzini job, except the material produced, some was hauled to be converted to another kind of material.

Mr. McFall: Yes. [32]

United States of America,
State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I was duly sworn as official court reporter in the foregoing entitled cause. That as such official court reporter, I was present in the hearing in said cause and while there took down in shorthand, all of the oral testimony adduced, and the proceedings had. That I have transcribed my said shorthand notes into typewriting; and that the foregoing typewritten matter is a full, true and correct transcript of my shorthand notes.

/s/ FRED L. BAKER,

Official Court Reporter.

[Endorsed]: Filed May 20, 1946.

[Endorsed]: No. 11353. United States Circuit Court of Appeals for the Ninth Circuit. Basich Brothers Construction Co., a corporation, and Hartford Accident and Indemnity Company, a corporation, Appellants, vs. United States of America, for the use of Bert Turner, Frank E. Hinman and Garland D. England, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed June 12, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11353

UNITED STATES OF AMERICA for the use
of BERT TURNER, FRANK E. HINMAN
and GARLAND D. ENGLAND,

Plaintiff and Respondent,

vs.

BASICH BROTHERS CONSTRUCTION CO.,
a corporation, and HARTFORD ACCIDENT
AND INDEMNITY COMPANY, a corpora-
tion,

Defendants and Appellants.

STATEMENT OF POINTS ON APPEAL

To the Honorable Paul P. O'Brien, Clerk of the
above entitled Court, and to Clifford R. McFall,
Esq., and Ralph W. Bilby, Esq.:

Appellants will rely upon the following points on
appeal:

(1) Were Andrew Duque and Carson S. Frazzini a co-partnership, doing business under the name of Duque & Frazzini, General Contractors, to whom the use plaintiffs furnished material or rendered services, being the basis of the Judgment rendered herein, material-men or sub-contractors of Basich Brothers Construction Co., the prime contractor?

(2) Are the use plaintiffs legally entitled to re-

cover from appellants under and pursuant to the Act of Congress known as the Miller Act, approved August 24, 1935, c642, 49 Stat. 793, 40 U.S.C.A., 270a, et seq., for the services rendered and material furnished to said Duque & Frazzini?

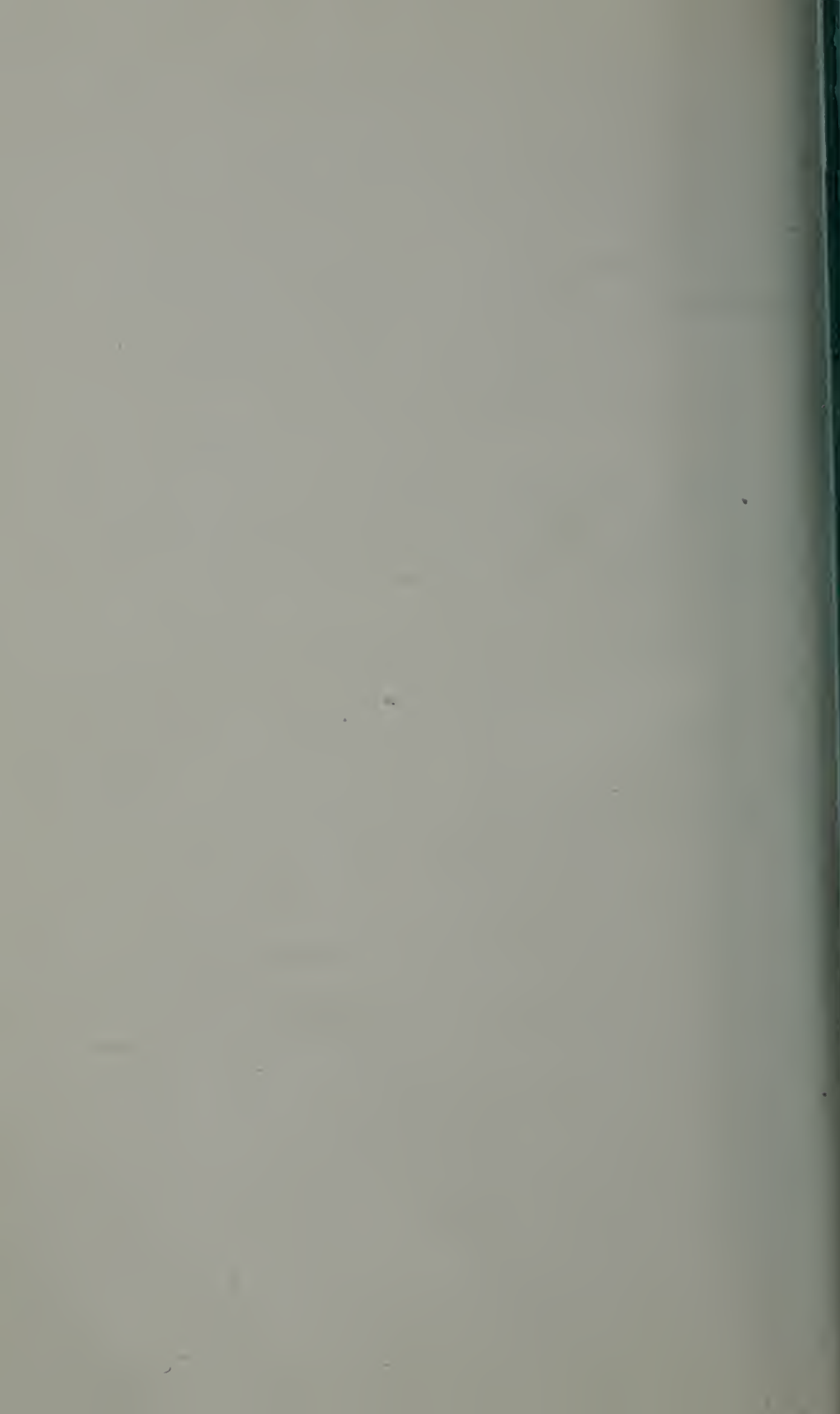
/s/ STEPHEN MONTELEONE,

/s/ OWEN F. GOODMAN,

Attorneys for Appellants.

(Affidavit of Mailing attached.)

[Endorsed]: Filed June 12, 1946. Paul P. O'Brien, Clerk.



No. 11353.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BASICH BROTHERS CONSTRUCTION Co., a corporation, and
HARTFORD ACCIDENT AND INDEMNITY COMPANY, a
corporation,

Appellants,

vs.

UNITED STATES OF AMERICA, for the use of BERT TUR-
NER, FRANK E. HINMAN and GARLAND D. ENGLAND,

Appellees.

APPELLANTS' BRIEF.

STEPHEN MONTELEONE,
1050 Petroleum Building, Los Angeles 15,
Attorney for Appellants.

FILED

AUG 20 1945



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(2) That the trial court erroneously misapplied the law to the undisputed evidence in finding that Duque & Frazzini to whom use plaintiffs rented trucks were subcontractors instead of materialmen and, basing its conclusion on such misapplication, found that the plaintiffs were entitled to recover from Appellant, Basich Brothers Construction Co., as the Prime Contractor, and its Surety, Hartford Accident and Indemnity Company under said Act of Congress.....	4
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(3) That the undisputed evidence establishes Duque & Frazzini, the parties to whom "use plaintiffs" furnished trucks (the rental value of which is the basis of the judgment herein), to have been materialmen furnishing Appellant, Basich Brothers Construction Co., with material and, therefore, use plaintiffs are not entitled to the benefits of said "Miller Act"	4
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- (4) The undisputed evidence establishes the fact that the trucks so furnished to said Duque & Frazzini were used solely in producing material thereafter acquired by Appellant, Basich Brothers Construction Co., and were not furnished in the prosecution of the work provided for in the government contract, and, therefore, Appellees are not entitled to judgment against Appellants by virtue of the provisions of said "Miller Act"..... 5

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No. 11353.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BASICH BROTHERS CONSTRUCTION COMPANY, a Corporation,
and HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA, for the use of BERT TURNER,
FRANK E. HINMAN and GARLAND D. ENGLAND,

Appellees.

JURISDICTIONAL STATEMENT.

This action was instituted in the District Court of the United States for the District of Arizona by the filing of a complaint entitled "United States of America for the use of Bert Turner, Frank E. Hinman and Garland D. England, plaintiff, vs. Basich Brothers Construction Company, a corporation, and Hartford Accident and Indemnity Company, a corporation, defendants, No. Civil 320-Tucson." The complaint was designated as follows: "Complaint under the Miller Act for Labor and Material Furnished on Government Contract. [Tr. p. 2.]

The complaint alleges as jurisdictional facts that defendant, Basich Brothers Construction Company, made and entered upon the performance of a contract exceeding

Two Thousand (\$2,000.00) Dollars in amount, with the United States of America for public work which said contract was to be and was performed in the County of Pima, State of Arizona; that defendant, Hartford Accident and Indemnity Company, was and is a corporate surety upon a payment bond furnished by said Basich Brothers Construction Company to the United States of America for the payment of all persons supplying labor and material in the prosecution of the work provided for in said contract, all under and pursuant to the Act of Congress known as the Miller Act, approved August 24, 1935, Chap. 642, 49 Stat. 793, 40 U. S. C. A., 270a *et seq.*, 9A F. C. A., Title 40, 270a *et seq.*, and the further fact that said use plaintiffs furnished labor and material in the prosecution of the work for in such contract, for which payment, although due, has not been made, as hereinafter more particularly alleged and set forth." [Tr. pp. 2 and 3; Par. I of said Complaint.]

Section 270b, Subsection (b), Title 40, of United State Code, Annotated, provides that, under the above alleged facts, suit shall be brought in the name of the United States for the use of the person suing in the United States District Court for any district in which the contract was to be performed and executed, irrespective of the amount in controversy within one year after date of final settlement of such contract. Plaintiff, in said complaint, alleged compliance with the provisions of said Miller Act, including the giving of the required written notice. [Tr. pp. 7 to 10, incl.]

Accordingly, said District Court of the United States for the District of Arizona acquired jurisdiction.

Defendants, by their answer, alleged that any labor or supplies furnished by any of said use plaintiffs as

alleged in the complaint were not supplied in the prosecution of the work between defendant, Basich Brothers Construction Company, and the United States of America, but, instead, was employed in the fabrication of material for Duque and Frazzini, third parties, and thereafter purchased from them before said material was actually installed or became a part of said public improvement. [Tr. p. 37; Par. I of Separate Defense.]

After trial, the trial court rendered judgment in favor of plaintiff, as prayed for in said complaint, and against said defendants.

The herein appeal is taken from said judgment pursuant to subsection (a) of Section 225 of Title 28 of the United States Code, Annotated, which provides that "the Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions:

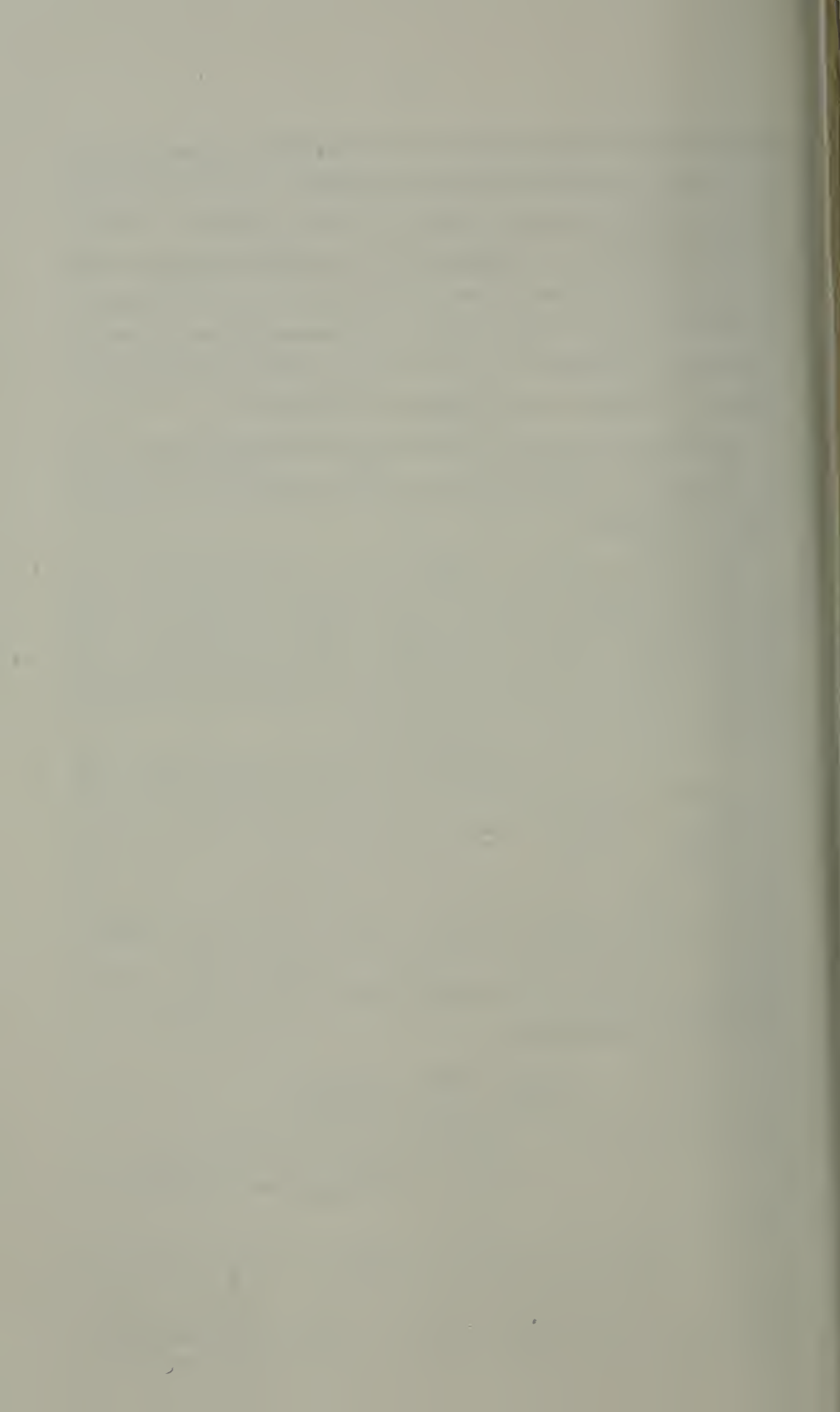
"FIRST: In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

The herein appeal is taken to review the above final decision of said District Court in the manner and in compliance with all requirements of law cases necessary in connection therewith.

Respectfully submitted,

STEPHEN MONTELEONE,

Attorney for Appellants.



No. 11353.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BASICH BROTHERS CONSTRUCTION Co., a corporation, and
HARTFORD ACCIDENT AND INDEMNITY COMPANY, a
corporation,

Appellants,

vs.

UNITED STATES OF AMERICA, for the use of BERT TUR-
NER, FRANK E. HINMAN and GARLAND D. ENGLAND,

Appellees.

APPELLANTS' BRIEF.

I.

Statement of Facts.

This action was brought by Appellees to recover from Appellants, Basich Brothers Construction Co., a corporation, as prime contractor, and its Surety, Hartford Accident and Indemnity Company, a corporation, the rental value of trucks furnished by use plaintiffs to one Duque & Frazzini. This action is based on the provisions of an Act of Congress known as the Miller Act.

The facts involved may be briefly stated as follows:

On January 25, 1945, said Appellant, Basich Brothers Construction Co., as prime contractor, entered into a con-

tract with the United States of America for the construction of taxiways, warmup and parking areas at the Davis-Monthan Field, Tucson, Arizona. Included in this contract were the following items:

“Item 9 Gravel embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and Sand for 18"-12"-18" portland cement concrete airfield pavement, Item 22 Rock and sand for 10" portland cement concrete airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2.” [Tr. p. 14.]

On February 7, 1945, said Appellant, Basich Brothers Construction Co., entered into a contract with Duque & Frazzini, by the terms of which said contract Duque & Frazzini agreed to furnish all materials, supplies and equipment, except as therein otherwise provided, and all labor required to perform said work above referred to as Items 9, 11, 15, 21, 22, 26A and 26B. [Tr. pp. 13 to 27, incl.] By the terms of said contract, said Duque & Frazzini were required to erect two plants, each to produce 800 cubic yards of suitable material enumerated in the above items. [Tr. p. 22.]

This contract approximated the total amount of each of said classifications of material to be produced by Duque & Frazzini and the unit price to be paid therefor. [Tr pp. 25 and 26.] Accordingly, the United States Engineers approved the quality of material at a site where said Duque & Frazzini were to produce the aforesaid material approximately 4½ miles from the site of the government construction project and thereupon said Appellant, Basich Brothers Construction Co., made necessary

arrangements to procure said site from the owners thereof. [Tr. pp. 44 and 45.]

Thereafter Duque & Frazzini proceeded to produce said material as required by the terms of their said contract with Appellant, Basich Brothers Construction Co.

All of the material so produced by Duque & Frazzini at their plant site, consisting of gravel, rock and sand, were delivered to Basich Brothers Construction Co. at the plant site, either in stockpile or dumped from the bins at the plant site into trucks of Basich Brothers Construction Co. and then hauled away by Basich Brothers Construction Co. to the government project. [Tr. pp. 25, 26 and 83.]

Use plaintiffs furnished certain trucks (in no manner related to the trucks of Basich Brothers Construction Co. used in hauling away said material) to said Duque & Frazzini, which in turn were employed by Duque & Frazzini producing said gravel, sand and rock at the aforesaid pit site before the same was so hauled away by Appellant Basich Brothers Construction Co. [Tr. pp. 6 to 10, incl., and p. 40.] These trucks of use plaintiffs were in no manner employed after the material was stockpiled or placed in bins by Duque & Frazzini to be hauled away by said Basich Brothers Construction Co. a distance of $4\frac{1}{2}$ miles to the site of the construction project. [Tr. pp. 25 and 26.] The production of the aforesaid material was under the sole and exclusive supervision of Duque & Frazzini pursuant to the requirements contained in their said contract with said Basich Brothers Construction Co. of date February 7, 1945. Duque & Frazzini, having failed to pay said use plaintiffs rentals due on said trucks, said use plaintiffs instituted the herein action

against Appellants, Basich Brothers Construction Co. and its Surety, Hartford Accident and Indemnity Company, to recover the amount of said rentals. The trial court held that Appellants were liable therefor under and pursuant to the provisions of the Miller Act and rendered judgment accordingly.

II.

Specifications of Errors Relied Upon by Appellants.

(1) That the ultimate finding of the trial court that Appellants are liable to use plaintiffs under the Act of Congress known as the "Miller Act" is based upon a misapplication of the law to the undisputed evidence.

(2) That the trial court erroneously misapplied the law to the undisputed evidence in finding that Duque & Frazzini to whom use plaintiffs rented trucks were subcontractors instead of materialmen and, basing its conclusion on such misapplication, found that use plaintiffs were entitled to recover from Appellant, Basich Brothers Construction Co., as the prime contractor, as its Surety, Hartford Accident and Indemnity Company under said Act of Congress.

(3) That the undisputed evidence establishes Duque & Frazzini, the parties to whom "use plaintiffs" furnished trucks, (the rental value of which is the basis of the judgment herein) to have been materialmen furnishing Appellant, Basich Brothers Construction Co., with material and, therefore, use plaintiffs are not entitled to the benefits of said "Miller Act."

(4) The undisputed evidence establishes the fact that the trucks so furnished to said Duque & Frazzini were used solely in producing material thereafter acquired by Appellant, Basich Brothers Construction Co., and were not furnished in the prosecution of the work provided for in the government contract, and, therefore, Appellees are not entitled to judgment against Appellants by virtue of the provisions of said "Miller Act."

III.

Uncontradicted Evidence Establishes Duque & Frazzini as Materialmen and Not Subcontractor of Basich Brothers Construction Co., the Prime Contractor.

There is only one issue involved on appeal and that is whether Duque & Frazzini were subcontractors within the meaning of the "Miller Act" and therefore the trucks furnished by use plaintiffs to Duque & Frazzini (being the basis of the judgment herein), were employed in the prosecution of the government project, or, instead, were mere materialmen.

That this was and is the only issue involved was clearly indicated in the Order upon Pretrial Conference, pursuant to Rule 16, wherein the following was agreed upon, to-wit:

"It was agreed by respective counsel that the only issue remaining for determination by the court under plaintiff's complaint and defendant's answer thereto is the question as to whether or not Duque & Frazzini were subcontractors within the meaning of the Miller Act, under which this suit is brought." [Tr. p. 45.]

IV.

Argument.

Section 270 (a), Title 40 of the United States Code, Annotated, provides, among other things, that:

“Before any contract, exceeding \$2000.00 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person who is hereinafter designated as ‘contractor.’ (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person.”

Subject to certain requirements therein specified, Section 270 (b), Title 40 of said United States Code, Annotated, provides that:

“(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not yet been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him.”

Appellants do not question that the material, itself, furnished by Duque & Frazzini to Basich Brothers Construction Co. contributed to the prosecution of the work which consisted of the construction of the Davis-Monthan Air Base, and that Duque & Frazzini themselves, as materialmen, would have a right of action against the Prime Contractor and its Surety under the Miller Act if not compensated therefor; but that anyone performing labor or furnishing equipment, as is the case at bar, to Duque & Frazzini in order to produce the material thereafter to be delivered to Appellant Basich Brothers Construction Co. and by it used in the prosecution of the government project would not be entitled to recover from Appellants under the "Miller Act."

Appellants contend that the undisputed evidence establishes the fact that Duque & Frazzini were materialmen and therefore use plaintiffs were not entitled to recover from Basich Brothers Construction Co., the Prime Contractor, or its Surety, and the judgment herein in favor of use plaintiffs and against Appellants should be reversed.

In the case of *MacEvoy v. United States*, 322 U. S. 102, the Supreme Court, in determining various rights created by the Miller Act, on page 104 said:

"Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot."

Appellants contend that the above case is authority in support of Appellants' contention that if the undisputed evidence shows Duque & Frazzini to be, in fact, materialmen rather than subcontractors, then use plaintiffs

are not entitled to the judgment herein. That the undisputed evidence does in fact support this contention is shown by the essential uncontradicted evidence introduced at the trial.

On January 25, 1945, defendant Basich Brothers Construction Co. entered into a contract with the United States for the construction of taxiways, warmup and parking aprons at the Davis-Monthan Field, Tucson, Arizona. [Tr. p. 14.]

In connection with the performance of this construction work, Basich Brothers Construction Co. had to acquire certain material consisting of rock, gravel and sand. [Tr. p. 14.]

Accordingly, the United States Engineers approved a site from which said material was to be produced, located about 4½ miles from the government project which site was thereupon leased by Appellant Basich Brothers Construction Co. [Tr. pp. 44 and 45.]

Duque & Frazzini, on February 7, 1945, entered into an agreement with Basich Brothers Construction Co. by the terms of which said agreement they agreed, among other things, to erect two plants, each to produce 800 cubic yards of the required material from said site. [Tr. p. 22.] Basich Brothers Construction Co., in turn, agreed to pay Duque & Frazzini a certain unit price for the material so produced. [Tr. pp. 25 and 26.]

Use plaintiffs, Bert Turner, Frank E. Hinman and Garland D. England, rented trucks to Duque & Frazzini, being the basis of the judgment herein, which were used in producing the above material. It is Appellants' contention that these trucks were not used in performing any work on the public project, itself, but were employed in producing material which was thereafter purchased by

Appellant Basich Brothers Construction Co. and by it then hauled away to the site of the project.

This court, in the case of *Northwest Roads Co., et al. v. Clyde Equipment Co.*, 79 F. (2d) 771, had under consideration the provisions of a Statute of the State of Washington somewhat similar to the "Miller Act" requiring contractors performing public improvements to furnish a faithful performance bond and a labor and material bond in favor of all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for carrying on such work. The contractor, Northwest Roads Co., was required to do all of the work and furnish all of the materials in prosecuting the work which required the quarrying, crushing and placing in stockpiles of the crushed rock. The contractor sublet to one Poulsen that part of the contract relating to rock crushing, and Poulsen, accordingly, agreed to furnish all necessary materials, labor and implements to perform his part of the contract and to place the crushed rock in bunkers and the contractor was then obliged to transport it to the stockpiles. Plaintiff, in that case, who rented equipment to Poulsen used in producing the crushed rock, sued to recover the rental value thereof. Recovery was had in the lower court on the theory that plaintiff's machinery and equipment were material furnished Poulsen as subcontractor. Appellants contend that recovery should be denied because Poulsen was not a subcontractor but materialman and therefore the action did not come within the terms of the statute.

The Court, in said case, on page 772, said:

"As we view it, the only materialman who can successfully maintain an action under the statute

is one who furnishes materials to a contractor or a subcontractor. *Neary v. Puget Sound Engineering Company*, 114 Wash. 1, 194 P. 830, is conclusive to the effect that a claim for services rendered to a mere materialman is beyond the protection of the statute. By the only reasoning available to us because of that holding, we must also say that a claim for materials furnished to a mere materialman is likewise without the provisions of the statute, in as much as the statute permits recovery only by any person or persons performing such services or furnishing material to any subcontractor.

“Appellee contends that Poulsen and Johnson were subcontractors because they agreed with the contractor to perform part of the later’s contract with Clallam County. On the other hand, appellants contend that Poulsen and Johnson were merely materialman because they did not undertake to actually install the material furnished or to fabricate the same into and make it a part of highways.

“It is unnecessary to consider what may be the general rule of distinction between a subcontractor and a materialman for the question as to whether Poulsen and Johnson were subcontractors or materialmen is determined by *Neary v. Puget Sound Engineering Co.*, 114 Wash. 1, 194 P. 830, 831.”

In connection with the above case of *Northwest Road Co., et al. v. Clyde Equipment Co.*, we are mindful of the fact that the Court was concerned with the provisions of a Statute of the State of Washington and, accordingly, was guided by the views of the Supreme Court of that State in construing the Statute. However, this court, in said case, in expressing its own views on page 773, stated:

“But even if we concede the fact that gravel was easily obtainable as a commodity in the open market, it might have some effect on the price of the material, but could not change the fact that the gravel was material which was to be supplied to the contractor, and which once supplied completed the obligation to the contractor, whether the contractor used the material in the construction of the highways, or whether it used such material in the construction of any other project.”

So may it be said in reference to the case at bar. Once the rock, sand or gravel produced by Duque & Frazzini were either stockpiled or dumped in the trucks of Appellant Basich Brothers Construction Co., to be, by it, hauled away to the government project, the obligation of said Duque & Frazzini thereupon was completed.

The line of distinction between a subcontractor and a materialman is clearly outlined in the case of *Baker, et al. v. Yakima Valley Canal Co.*, referred to in the above case of *Northwest Roads Co., et al. v. Clyde Engineering Co.* The Court, in said case of *Baker, et al. v. Yakima Valley Canal Co.*, 137 Pac. Rep. 342, on page 345, said:

“Finally, we say since the statute clearly contemplates a distinction between subcontractors and materialmen, the line of distinction contemplated by the statute between these two must be definitely drawn somewhere; otherwise the owner of property would never know how to protect himself. He can reasonably be expected to know of a subcontract, and the work performed in carrying it out, because the work of the subcontractor, or some part of it, is performed upon the property, and in the actual construction of the improvement. It would be wholly unreasonable to expect him to go afield and investi-

gate as to all labor performed by employees of materialmen furnishing the various materials used in the work; none of such labor being connected with the actual work of construction, nor performed upon his premises. The statute must be liberally construed, but a liberal construction does not mean an unfair construction even in the interest of a favored class."

That the Supreme Court of the United States entertained a similar view in reference to the "Miller Act" as the Supreme Court of the State of Washington in reference to the State Statute is clearly indicated in the case of *MacEvoy v. United States*, *supra*, page 110, as follows:

"Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him."

The Court, in the case of *Nearby v. Puget Sound Engineering Co.*, *supra*, reported in 194 Pac. Rep. 830, on page 832 quoted with approval the language in the case of *Baker v. Yakima Valley Canal Co.*, *supra*, as follows:

"Betts merely furnished sand and gravel used in the work, just as someone else furnished the cement and still another the steel. If he was a subcontractor, then every materialman would fall within that class, and the distinction manifestly intended by the statute would be obliterated."

Use plaintiffs, in the case at bar, did not furnish trucks in the prosecution of the government project, but instead

they furnished the trucks to Duque & Frazzini in order to enable them to produce rock, sand and gravel which material in turn was used in the prosecution of the work; consequently Duque & Frazzini would have been the only parties entitled to recover from Appellants under the Miller Act. There is no logical distinction between a person supplying material to a materialman as was the situation in the case of *MacEvoy v. United States, supra*, and a person supplying labor or supplies to materialman in order to enable him to produce the material to be used on a government project as is the case at bar.

The Court, in the case of *Hihn-Hammond Lumber Co. v. Elsom*, 171 Cal. 570, in construing the Mechanic's Lien Law of the State of California, elaborated on the distinction between a subcontractor and a materialman. On page 574, the Court, in that case said:

“Persons who merely furnish material to the contractors to be used, and which are used, in the construction of the building come within the second class, as materialmen. The term ‘subcontractor’ embraces all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner.”

In the case of *MacEvoy Co. v. United States*, 322 U. S. 102, the Supreme Court, in defining the meaning of the word “subcontractor” as used in the Miller Act, on page 109, said:

“The fact that subcontractors were so consistently distinguished from materialmen and laborers in the course of the formation of the Act is persuasive evi-

dence that the word 'subcontractor' was used in the proviso of par. (a) in its technical sense so as to exclude materialmen and laborers."

In defining the meaning of "subcontractor" under its technical meaning, the Court in this case of *MacEvoy v. United States*, on page 108 said:

"But under the more technical meaning as established by usage in the building trades, a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen."

All of the material required of Duque & Frazzini to be furnished to Appellant, Basich Brothers Construction Co., was either put in bins by Duque & Frazzini and then hauled away by Basich Brothers Construction Co. or stockpiled by Duque & Frazzini and then rehandled and hauled away by Basich Brothers Construction Co. [Tr. pp. 25 and 26.] After this material was hauled away by Basich Brothers Construction Co., the larger portion thereof was not used in the same state as when so delivered, but had to be reconverted into cement concrete pavement or into asphaltic pavement. [Tr. p. 26.] Under these conditions, Appellants contend that Duque & Frazzini were no more subcontractors under the Miller Act in supplying the rock, sand and gravel in order to construct the cement concrete pavement than the parties who furnished Basich Brothers Construction Co. with the Portland Cement or asphalt to be mixed with the rock, sand and gravel in order to construct the cement concrete pavement or asphaltic pavement.

V.

Conclusion.

Appellants earnestly contend that the undisputed evidence establishes the fact that Duque & Frazini were mere materialmen and not subcontractors even though the agreement under which they were producing material was designated as a "subcontract Agreement." They were, in no manner, performing any part of the original contract but were merely producing material which in turn was delivered to and removed by Appellant, Basich Brothers Construction Co., and a larger portion thereof thereafter changed into cement concrete pavement or asphaltic concrete by adding thereto other ingredients such as water, Portland Cement or asphalt. To impose a liability on the prime contractor and its surety for the amount of the rental value of trucks furnished by use plaintiffs to produce this material before its delivery to Appellant, Basich Brothers Construction Co. would, employing the language of the Supreme Court in the case of *MacEvoy v. United States, supra*, on page 111 "create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative."

Appellants, therefore, earnestly urge that the judgment of the lower court should be reversed and the cause remanded with instructions to enter a judgment in favor of the Appellants.

Respectfully submitted,

STEPHEN MONTELEONE,

Attorney for Appellants.

No. 11353

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BASICH BROTHERS CONSTRUCTION COMPANY, a Corpora-
tion, and HARTFORD ACCIDENT AND INDEMNITY COM-
PANY, a Corporation,

Appellants.

vs.

UNITED STATES OF AMERICA, for the use of BERT TUR-
NER, FRANK E. HINMAN and GARLAND D. ENGLAND,

Appellees.

APPELLEES' BRIEF.

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FILED

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Appellees.

APPELLEES' BRIEF.

Statement of Jurisdiction.

The appellants' Jurisdictional Statement sets forth substantially the pleadings and facts upon which are based the jurisdiction of the District Court in this case and of this Court on Appeal.

Statement of the Case.

The appellants' Statement of the Case is substantially correct, so far as it goes, except the statement found at the bottom of page 3 of appellants' brief that "The production of the aforesaid material was under the sole and exclusive supervision of Duque & Frazzini pursuant to

the requirements contained in their said contract with said Basich Brothers Construction Co. of date February 7, 1945." The record shows that the subcontractor, Duque & Frazzini, was required by Article I of the Subcontract Agreement [Tr. p. 15] to furnish all materials and equipment and perform all labor required for the completion of the work in accordance with the provisions and specifications of the original contract and "under the direction and to the satisfaction of the Principal's Engineer," and that this supervision was exercised not only by the Principal's Engineer, but by the general superintendent of the prime contractor, as well, who on at least one occasion took over the active operation of the Duque & Frazzini job. [Tr. pp. 78, 79, 80.]

The following additional facts should be noted:

Basich Brothers actually paid all labor payrolls of Duque & Frazzini [Tr. pp. 21 and 45];

That all of the work which Duque & Frazzini did pursuant to the Subcontract referred to in the complaint was done on premises belonging to Stefan Gollob located approximately four and one-half miles from the base referred to in the contract as Davis-Monthan Field. That said premises were leased to the defendant, Basich Brothers Construction Co., by Stefan Gollob for the purpose of making available to said Basich Brothers Construction Co. the gravel, rock, and earth on the premises for use upon the work required of the defendant, Basich Brothers Construction Co., under the contract alleged in the complaint, and that the said defendant, Basich Brothers Construction Co., paid all rentals for the use of said premises for said purposes;

That said site was first selected by the United States Engineers before Basich Brothers Construction Co. could acquire the site from the owner for the purposes aforesaid [Tr. pp. 44, 45];

That in the performance of its contract with the United States, Basich Brothers Construction Co., the prime contractor, maintained and operated two plants on the leased premises above referred to [Tr. p. 45];

That the subcontract involved an amount in excess of the sum of \$100,000.00 [Tr. p. 45] and contains a provision for renegotiation under Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Public Law 528, 77th Congress, pp. 335-6, U. S. Code Congressional Service, 1942, which provides for renegotiation of the price of *subcontracts* [Tr. pp. 22, 23, 24];

That the defendant Basich Brothers Construction Co., as third party plaintiff, brought into this case the Glens Falls Indemnity Company of Glens Falls, New York, surety on the subcontract bond, as a third party defendant, alleging that said surety was liable to the said defendant and third-party plaintiff for all of the plaintiff's claim against it.

Summary of Argument.

The firm of Duque & Frazzini was a subcontractor within the meaning and scope of the "Miller Act" under the definition of that term established by the Supreme Court in the case of *MacEvoy v. United States*, 322 U. S. 102 at 108, 88 L. Ed. 1163 at 1168.

Argument.

The appellants urge upon this court the rule as to subcontractors applied in a line of state court decisions which hold that one cannot be a subcontractor under the various state statutes considered unless he actually installs the material furnished into the structure or improvement in question. Appellants cite the case decided by this court of *Northwest Roads Co., et al. v. Clyde Equipment Co.*, 79 F. (2d) 771. In that case this court specifically stated that it was unnecessary to consider what may be the general rule of distinction between a subcontractor and a materialman, for the reason that the Supreme Court of Washington had determined that question in the case of *Neary v. Puget Sound Engineering Company*, 114 Wash. 1, 194 Pac. 830, and that this court was bound by the construction of the State Supreme Court in that case. That decision, therefore, is not applicable to the question presented on this appeal.

There is another line of state cases which adopts the rule that a subcontractor is anyone who takes from the prime contractor a specific part of the material requirements of the original contract, such material to be furnished in accordance with the plans and specifications of the original contract; and this is so regardless of whether such subcontractor actually installs the material in the improvement or not.

The following cases illustrate this rule:

Holt v. City of Melrose (Mass.), 41 N. E. (2d) 562;

People—use of Youngs v. U. S. Fid. & Guar. Co.
(Mich.), 249 N. W. 20; following *Avery v.*
Ionia County (Mich.), 39 N. W. 742;

Standard Accident Insurance Co. v. Deep Rock Oil
Corp. (Okla.), 68 P. (2d) 808.

The Supreme Court of the United States has clearly adopted and applied the rule announced in the latter group of cases in construing the Miller Act in the case of *MacEvoy v. United States, supra*. In that case the Supreme Court laid down this definition of a subcontractor, (p. 108):

“A subcontractor is one who performs for and takes from the prime contractor a specific part of the labor *or* material requirements of the original contract.”

That the firm of Duque & Frazzini were subcontractors within the scope of this rule would seem to require no argument in the light of this record. The subcontract plainly calls for the performance of a specific part of the material requirements of the original contract to be performed in accordance with “all the provisions of the original contract and of the specifications and plans referred to therein,” all of which are made a part of the subcontract agreement. [Tr. pp. 14, 15.] This material was to be produced and fabricated on the premises leased to and under the control of Basich Brothers Construction Co. and upon which they had two plants and were doing

part of the work under the prime contract. Not only that, but the prime contractor actually paid for all labor used in the work done by Duque & Frazzini under its subcontract and required of said subcontractors a performance bond upon which the prime contractor has brought suit in this action to hold the surety on that bond liable to it for the plaintiff's claim herein against the defendants.

Appellants mention the rule laid down in the *MacEvoy* case on page 14 of their brief and follow it with a one-half page argument to the effect that Duque & Frazzini were not subcontractors under the rule laid down in the state cases first above mentioned, because Duque & Frazzini did not undertake to actually install the material furnished into the runways. This argument is made in the face of the Supreme Court's definition which makes no such requirement.

The appellants do not argue, nor could they in good faith argue upon this record, that Duque & Frazzini did not take from the prime contractor a specific part of the labor or material requirements of the original contract.

Duque & Frazzini being subcontractors under the Miller Act, the plaintiffs are entitled to recover against the prime contractor and the surety on its payment bond for labor and materials furnished the subcontractor, under and by virtue of the proviso of Section 270b of the Miller Act.

Conclusion.

The appellants concede that the judgment of the District Court was correct and must be affirmed if Duque & Frazzini were subcontractors under the Miller Act. That they were such under the rule laid down in the *MacEvoy* case clearly appears from this record. The appellees respectfully submit, therefore, that the judgment should be affirmed.

Respectfully submitted,

CLIFFORD R. McFALL,
Attorney for Appellees.

